

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Minnesota RFL Republican Farmer Labor Caucus, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald,

Plaintiffs,

v.

Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor; Mark Metz in his official capacity as County Attorney for Carver County, Minnesota, or his successor; Karin Sonneman, in her official capacity as County Attorney for Winona County, Minnesota, or her successor; and James C. Backstrom in his official capacity as County Attorney for Dakota County, Minnesota or his successor,

Defendants.

Case No. \_\_\_\_\_

**Complaint for Declaratory and Injunctive Relief**

**Introduction**

1. In today's political atmosphere, it is not uncommon to see, read, or hear political advertisements that exaggerate a candidate's record, political positions, or personal traits. These ads may be produced by a candidate, a candidate's political party, or a political committee affiliated with a candidate, or by an organization unrelated to the candidate. These political advertisements reflect freedom of expression and speech in the marketplace of ideas.

2. During elections and election campaigns, the Plaintiffs engage in express political advocacy. Political advocacy includes running for office; supporting candidates for office; engaging in political debates; speaking at events; inviting others to events; holding events;

writing letters or editorials; speaking with news reporters; speaking with friends, family members, strangers, other candidates, office holders, and governmental and nongovernmental officials regarding political philosophies, beliefs, positions, opinions, and interpretations; and encouraging community members to support their positions regardless of their personal ideology. The avenues of advocacy also include the use of e-mail, websites, and brochures to encourage the participation in political activities and expression. Such political speech is at the core of First Amendment protection.

3. In the course of engaging in political speech during elections and campaigns, the Plaintiffs make assertions, and give their opinions or beliefs, about endorsements from political parties and other organizations.

4. The Plaintiffs bring this suit to challenge the constitutionality of Minn. Stat. § 211B.02 because the section limits what *any person* may say regarding the support or endorsement of a “major political party,” “party unit,” or *any other* organization:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

The section’s first sentence exposes anybody who makes a claim of support or endorsement by any kind of organization—even a truthful claim—to the accusation that the claim was actually false. Indeed, the sentence makes discussing politics legally precarious because of the risk that something that one says will be characterized as falsely “implying” support or endorsement. And, in a bizarre contemporary example of prior restraint, § 211B.02’s second sentence outlaws stating “in written campaign material” that an individual supports or endorses a “candidate or ballot question” without first getting the individual’s “written permission”—a prohibition that

applies even if the claim of support or endorsement is truthful. The sentence actually bans truthful political speech.

5. An alleged violation of § 211B.02's can result in civil and criminal prosecution. The Plaintiffs know of the section, and they know of the consequences for violating it. They also know of cases in which persons have been punished for violating it. But, the Plaintiffs do not know how the section will be applied in the future. Hence, § 211B.02 presents the Plaintiffs—and others—with a realistic danger of prosecution for expressing their political opinions, interpretations, or beliefs. That danger risks chilling the Plaintiffs'—and others'—constitutionally protected political speech, even if nobody is ever prosecuted for violating the section.

6. Because of the threat posed by § 211B.02—a threat of known reality, but unknown reach—the Plaintiffs have, in fact, curtailed their political activities.

7. In other words, § 211B.02 is actually chilling and deterring the Plaintiffs' speech about political support and endorsements under the threat of civil and criminal penalties.

8. The Eighth Circuit has already invalidated a closely related section of Minn. Stat. ch. 211B—Minn. Stat. § 211B.06—on First Amendment grounds. *281 Care Comm. v. Arneson*, 766 F.3d 774, 787, 789, 795–96 (8th Cir. 2014). Section 211B.06 prohibited knowingly making a false statement about a candidate's "character or acts" or about "the effect of a ballot question." The Eighth Circuit held that because § 211B.06 restricted political speech, the section was subject to strict scrutiny, and the court struck the law down because it was not narrowly tailored. *281 Care Comm.*, 766 F.3d at 784, 787–96.

9. Section 211B.02 is essentially a parallel section that prohibits making a false statement about support or endorsement for a candidate or ballot question, rather than about a

candidate's "character or acts" or about "the effect of a ballot question." *Compare* Minn. Stat. § 211B.02, *with* Minn. Stat. § 211B.06, *invalidated by* *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014).

10. Section 211B.02 is unconstitutional for the same reasons that § 211B.06 is unconstitutional. Section 211B.02, like § 211B.06, is a content-based restriction on political speech and is thus subject to strict scrutiny. *See 281 Care Comm.*, 766 F.3d at 784. And, like the already invalidated § 211B.06, § 211B.02 is not narrowly tailored; on the contrary, § 211B.02 is overbroad for the same reasons that § 211B.06 was overbroad.

11. Section 211B.02 empowers *anybody* to bring an administrative action *against anybody else* on the pretense that the person complained of has made a false statement in a political campaign. To make a public statement about support or endorsement for a candidate is thus to expose yourself to the risk of a retaliatory administrative action—and possibly a criminal prosecution—even if what is said, is in fact, demonstrably true. So § 211B.02 chills both true and false political speech; and, like § 211B.06, § 211B.02 encourages bad-faith retaliatory complaints, counter-productively "[opening] a Pandora's box to disingenuous politicking itself." *281 Care Comm.*, 766 F.3d at 796.

12. And, just as with § 211B.06, a less restrictive alternative exists for policing the prohibited false speech: counter-speech. If somebody makes a false claim about support or endorsement, other people can just point out that the claim is false. *See 281 Care Comm.*, 766 F.3d at 793–94. People may even use their own broad First Amendment freedoms to denounce the person who made the false claim as a liar. Exposing false campaign speech does not require tattling to an administrative law judge or a prosecutor. *Id.* at 793.

13. Moreover, the section creates a serious risk of an actual finding of liability even for a person who does not make a knowingly false statement.

14. The Plaintiffs challenge the constitutionality of Minn. Stat. § 211B.02 and seek declaratory and injunctive relief. Because § 211B.02 infringes and chills the exercise of the Plaintiffs' federal constitutional rights to freedom of speech and freedom of expressive association, the Plaintiffs ask this Court to declare § 211B.02 unconstitutional and to permanently enjoin the Defendants from enforcing the section.

## **Jurisdiction and Venue**

15. In bringing this case, the Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1331 (federal-question jurisdiction), 28 U.S.C. § 2201 (declaratory-judgment jurisdiction), and 42 USC §§ 1983, 1988 (civil-rights statutes).

16. Venue is proper in this Court under 28 U.S.C. § 1391 because all the Defendants are Minnesota county attorneys and reside within this district, and because the events or omissions giving rise to the claims presented occurred within this district.

## **Parties**

### **A. The Plaintiffs.**

17. The Plaintiffs are political candidates, political associations, and individuals who engage in political activities relating to political elections and campaigns in Minnesota.

#### ***1. Plaintiff Bonn Clayton.***

18. Plaintiff Bonn Clayton of Chanhassen, Minnesota, is a long-time party activist in the Republican Party of Minnesota.

19. Clayton has been involved over the years with Republican Party of Minnesota judicial-endorsing conventions, with political campaigns, and with the application of § 211B.02.

***2. Plaintiff Michelle MacDonald.***

20. Plaintiff Michelle L. MacDonald of West St. Paul, Minnesota, was a nonpartisan candidate for justice of the Minnesota Supreme Court in 2018. MacDonald ran in the general election on November 6, 2018 and lost.

21. MacDonald was also a 2016 candidate for the Minnesota Supreme Court. She filed to run against incumbent Justice Natalie Hudson, but was defeated.

22. MacDonald was also a 2014 candidate for the Minnesota Supreme Court. In that election, the Republican Party of Minnesota endorsed her candidacy, but she lost in the general election.

***3. Plaintiff Don Evanson.***

23. Plaintiff Don Evanson of Winona, Minnesota, is a long-time party activist in the Republican Party of Minnesota.

24. Evanson has been involved over the years with Republican Party of Minnesota judicial-endorsing conventions, with political campaigns, and with the application of § 211B.02.

***4. Plaintiffs Vincent Beaudette and Vince for Statehouse Committee.***

25. Plaintiff Vincent Beaudette of Victoria, Minnesota, was a Republican candidate for the Minnesota State House of Representatives seat for District 47B in the election to be held on November 6, 2018.

26. Plaintiff Vince for Statehouse Committee is an organization created to support Beaudette in that election.

27. In the 2018 election, the Republican Party of Minnesota local organization endorsed Beaudette for House seat 47B.

28. Later, Beaudette lost the primary on August 14, 2018 to Greg Boe. Boe received 57% of the vote (1,324 votes). Beaudette received 43% of the vote (1,000 votes).

29. Despite losing the primary, Beaudette sought to be elected on November 6, 2018 as a write-in candidate and wanted to campaign as the candidate endorsed by the local Republican Party of Minnesota organization.

30. For fear of being accused of violating § 211B.02, Beaudette did not campaign in the general election as the “Republican-endorsed” candidate.

31. Beaudette is considering another campaign for public office in 2020 and in the future.

32. Vince for Statehouse Committee is supporting Beaudette’s campaign for public office in 2020 and in the future.

##### ***5. Plaintiff Minnesota RFL Republican Farmer Labor Caucus.***

33. Minnesota RFL Republican Farmer Labor Caucus (Minnesota RFL) is a political association created in 2018 that supports Republican Party of Minnesota candidates for office. Despite having this purpose, Minnesota RFL is independent of, and is not a unit of, the Republican Party of Minnesota or the United States Republican Party. But since its creation, Minnesota RFL has been affiliated with the Republican Party of Minnesota.

34. Minnesota RFL activities include inviting speakers to events, encouraging community members to support the organization and the candidates that it supports, and engaging in debate on political issues, policies, or other similar matters of public concern.

35. Minnesota RFL plans to endorse individuals seeking political office in Minnesota in 2020. Additionally, Minnesota RFL has sought, and seeks to influence, how individuals vote on candidates or ballot questions.

36. On or about April 23, 2018, Minnesota RFL received a cease-and-desist letter from the Minnesota DFL Party threatening legal action if Minnesota RFL continues to use Minnesota RFL's logo. A copy of this letter is attached as Exhibit 1.

37. Minnesota RFL is concerned that if it continues to use its logo, then somebody will accuse Minnesota RFL—or somebody else using the logo—of violating § 211B.02 on the theory that the logo's use falsely implies the Minnesota DFL Party's support or endorsement.

## **B. The defendants.**

### ***1. Defendant Mike Freeman.***

38. Defendant Mike Freeman, the county attorney for Hennepin County, Minnesota, is sued in his official capacity. As county attorney, he has, under Minn. Stat. § 211B.16, subd. 3, authority to prosecute a violation of § 211B.02.

### ***2. Defendant Mark Metz.***

39. Defendant Mark Metz, the county attorney for Carver County, Minnesota, is sued in his official capacity. As county attorney, he has, under Minn. Stat. § 211B.16, subd. 3, authority to prosecute a violation of § 211B.02.

### ***3. Defendant Karin Sonneman.***

40. Defendant Karin Sonneman, the county attorney for Winona County, Minnesota, is sued in her official capacity. As county attorney, she has, under Minn. Stat. § 211B.16, subd. 3, authority to prosecute a violation of § 211B.02.

**4. Defendant James C. Backstrom.**

41. Defendant James C. Backstrom, the county attorney for Dakota County, Minnesota, is sued in his official capacity. As county attorney, he has, under Minn. Stat. § 211B.16, subd. 3, authority to prosecute a violation of § 211B.02.

**Standing**

42. An actual controversy exists between the parties, and the Plaintiffs have suffered an injury-in-fact that is directly traceable to the Defendants. 28 U.S.C. § 2201. Specifically, the Plaintiffs have engaged, or propose to engage, in activities that Minn. Stat. § 211B.02 prohibits—or that the Defendants might claim to be prohibited by § 211B.02. The Plaintiffs fear that, as a result of the Plaintiffs' speech or expressive activities, at least one of the Defendants will prosecute at least one of the Plaintiffs for violating § 211B.02. Therefore, the Plaintiffs and each of them have had their political speech deterred and chilled.

43. The impending threatened injury to the Plaintiffs is real and concrete.

44. This Court's favorable decision will redress the Plaintiffs' injuries and allow them to exercise their First Amendment rights without fear of being sued or prosecuted under § 211B.02.

**Chapter-211B Enforcement Procedures**

45. Under Minn. Stat. § 211B.32, anyone may file a complaint alleging a violation of § 211B.02 with the Minnesota Office of Administrative Hearings. *See* Minn. Stat. §§ 211B.31 (defining “office” to mean “the Office of Administrative Hearings” (the OAH) for purposes of Minn. Stat. §§ 211B.32–36), 211B.32, subd. 1(a) (requiring that a complaint alleging a violation of ch. 211B be filed with “the office,” i.e., the Office of Administrative Hearings, but placing no

limit on who may file); *281 Care Comm.*, 766 F.3d at 790 (recognizing “that *anyone* may lodge a complaint with the OAH alleging a violation of § 211B.06”).

46. Although § 211B.32, subd. 1(a) requires that the OAH dispose of a complaint before a county attorney may prosecute the violation alleged in the complaint, nothing in ch. 211B precludes a county attorney from filing a complaint with the OAH. Again, anyone may file.

47. Under § 211B.32, subd. 3, “[t]he complaint must be in writing, submitted under oath, and detail the factual basis for the claim that a violation of law has occurred.”

48. Under § 211B.32, subd. 4, the complainant has the burden of proving a violation of § 211B.02 by a preponderance of the evidence.

49. Within three business days after the OAH receives a complaint, an administrative law judge (ALJ) must make a preliminary determination about what to do with it. Minn. Stat. § 211B.33, subd. 1. The ALJ must dismiss the complaint if it fails to “set forth a *prima facie* violation of chapter 211A or 211B.” *Id.*, subd. 2(a). If “the complaint sets forth a *prima facie* violation of” § 211B.02, and if “the complaint was filed within 60 days before the primary or special election or within 90 days before the general election to which the complaint relates, the administrative law judge, on request of any party, must conduct an expedited probable cause hearing under section 211B.34.” Minn. Stat. § 211B.33, subd. 2(c). If “the complaint sets forth a *prima facie* violation of” § 211B.02, and if the complaint “was filed more than 60 days before the primary or special election or more than 90 days before the general election to which the complaint relates, the administrative law judge must schedule an evidentiary hearing under section 211B.35.” Minn. Stat. § 211B.33, subd. 2(d).

50. The ALJ must hold a probable cause hearing under § 211B.34 regardless of whether § 211B.33, subd. 2(c) or (d) applies, but the timeframe depends on whether the hearing must be expedited under § 211B.33, subd. 2(c):

The assigned administrative law judge must hold a probable cause hearing on the complaint no later than three business days after receiving the assignment if an expedited hearing is required by section 211B.33, except that for good cause the administrative law judge may hold the hearing no later than seven days after receiving the assignment. If an expedited hearing is not required by section 211B.33, the administrative law judge must hold the hearing not later than 30 days after receiving the assignment.

Minn. Stat. § 211B.34, subd. 1.

51. If, at the probable cause hearing, the ALJ determines that the complaint is not supported by probable cause, the ALJ must dismiss the complaint. *Id.* § 211B.34, subd. 2-2(a). If, at the hearing, the ALJ determines that the complaint is supported by probable cause, the chief ALJ must schedule an evidentiary hearing on the complaint under § 211B.35. *Id.* § 211B.34, subd. 2, 2(b).

52. If an evidentiary hearing is required, the chief ALJ must assign the complaint to a panel of three ALJs who will preside at the hearing. Minn. Stat. § 211B.35, subd. 1. How soon the hearing must be held depends on several factors. *Id.*

53. After the hearing, the three-judge panel must make one of several dispositions, which include dismissing the complaint, issuing a reprimand, imposing a civil penalty of up to \$5,000, or referring the complaint to a county attorney. *Id.*, subd. 2.

54. A county attorney may prosecute any violation of chapter 211B, including a violation of § 211B.02. Minn. Stat. § 211B.16, subd. 3.

55. A violation of § 211B.02 is a misdemeanor. *See* Minn. Stat. § 211B.19 (providing that a violation of chapter 211B is a misdemeanor unless a different penalty is provided).

56. A violation of § 211B.02 is thus punishable by imprisonment for up to 90 days or a fine of up to \$1,000. *See* Minn. Stat. § 609.03 (providing for punishment for crimes for which no other punishment is provided), 609.03(3) (describing the punishment for a misdemeanor); *id.* § 609.015, subd. 2 (providing that chapter 609 applies to crimes created by other provisions of the Minnesota Statutes).

## **Factual Background**

### **A. Bonn Clayton.**

57. The following facts about Clayton are drawn mainly from the OAH Findings of Fact, Conclusions and Order imposing a civil penalty on Clayton for violating § 211B.02, and from the Minnesota Court of Appeals' decision upholding that order, *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10, 2014), *rev. denied* (Minn. 2014), *cert. denied*, 135 S.Ct. 1399 (2015). A copy of the OAH Findings of Fact, Conclusions and Order is attached as Exhibit 2. An amendment to that document is attached as Exhibit 3. A copy of the Court of Appeals' opinion is attached as Exhibit 4.

58. Clayton has held various positions in the Republican Party of Minnesota.

59. He served as a member of the party's 2012 judicial-election committee.

60. Before each party convention, the Republican Party of Minnesota forms a judicial-election committee, one of several temporary, convention-specific committees that are created to help in carrying out the state convention's work.

61. According to the party's rules in 2012, the judicial-election committee did not have the power to endorse a candidate, but the committee did have the power to recommend that the state-convention delegates endorse a candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals.

62. The state-convention delegates had the power to confer the party's endorsement on a candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals.

63. Under the party's rules in 2012, after the committee issued its report, the state-convention delegates would vote on whether to endorse candidates for the Minnesota Supreme Court or the Minnesota Court of Appeals. If a majority of the delegates voted in favor of making endorsements, then the delegates were to vote on whether to endorse specific candidates for seats on the courts.

64. Clayton presented the judicial-election committee's report to the convention. He also encouraged the convention delegates to endorse Tim Tingelstad over then-incumbent Justice David Stras for a seat on the Minnesota Supreme Court.

65. The convention delegates voted to make endorsements, but, after a discussion about whether to endorse Tim Tingelstad over Justice Stras, the delegates then voted in favor of overturning their previous decision to endorse candidates. Clayton was present for the latter vote.

66. On October 18, 2012, Clayton sent about 7,000 state Republicans an email in which he encouraged the recipients to visit a website, [judgeourjudges.org](http://judgeourjudges.org). Here is the excerpt of the email reproduced in the Court of Appeals' opinion, including the court's alterations:

Dear Judicial District Delegates and Alternates,

Just before every election, Party leaders begin to get many calls from voters wondering who they should vote for in the Minnesota Judicial races.

So, we have put together a Voters' Guide, which we hope will be helpful.

Just go to our website [www.judgeourjudgesmn.org](http://www.judgeourjudgesmn.org).

It's just a new website, so it's still very simple. We currently have the names of our three recommended candidates for Supreme Court....

Please also send this link to all of your [basic political organizational unit's] precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates. And send the link to anybody else you can think of!

....

Bonn Clayton, Convener

Judicial District Republican Chairs

Republican Party of Minnesota.

*Niska*, 2014 WL 902680, at \*1–2.

67. Clayton posted a “2012 Minnesota Judicial Voters’ Guide” on [www.judgeourjudgesmn.org](http://www.judgeourjudgesmn.org).

68. Although the guide did not use the word “endorse” or “endorsement” or any inflected form of either word, the guide “*strongly recommended*” that Minnesota Republicans vote for three supreme court candidates: Dan Griffith, Tim Tingelstad, and Dean Barkley.

69. To support the conclusion that the website falsely claimed the endorsement of the Republican Party of Minnesota, the Court of Appeals provided this description of the website:

The home page represented that the website was sponsored by the “Republican Party of Minnesota—Judicial District Chairs Committee.” The bottom of the page stated, “Prepared and paid for by: Republican Party of Minnesota—Judicial District Republican Chairs.” Clayton’s name was also listed at the bottom, and his signature line designated, “Republican Party of Minnesota.” Another page of the website gave a biography of Tingelstad with similar implications that the RPM supported his candidacy.

*Niska*, 2014 WL 902680, at \*2. Although the Plaintiffs do not concede that Clayton violated Minn. Stat. § 211B.02, the direct quotations from the website are accurate.

70. In response to a request from the Republican Party of Minnesota’s legal counsel that Clayton remove “Republican Party of Minnesota” from the website, Clayton replaced “Republican Party of Minnesota—Judicial District Chairs Committee” with “First Judicial

District Republican Committee of the Republican Party of Minnesota” on the website. The party’s legal counsel told Clayton that the substituted language was still unacceptable.

71. Harry Niska, a Republican Party of Minnesota state convention delegate, filed a complaint with the OAH accusing Clayton of violating § 211B.02 by falsely claiming that the party had endorsed the three candidates for Supreme Court seats.

72. An OAH three-judge panel found that Clayton had violated § 211B.02 by falsely claiming that the party had endorsed the three candidates. The panel imposed a \$600 penalty on Clayton for violating § 211B.02.

73. Clayton timely appealed the panel’s order to the Minnesota Court of Appeals.

74. The Court of Appeals upheld the panel’s determination that Clayton violated Minn. Stat. § 211B.02. *Niska*, 2014 WL 902680, at \*1.

75. The court rejected Clayton’s contention that § 211B.02 was unconstitutional, at least as applied to him, under *United States v. Alvarez*, 567 U.S. 709 (2012). *Niska*, 2014 WL 902680, at \*10. The court distinguished *Alvarez* on the ground that the state interest protected by § 211B.02—the interest in accurate political speech—made counter-speech an inadequate remedy:

Clayton contends that section 211B.02 was unconstitutionally applied to him because it did not require the RPM to engage in counterspeech to rebut his falsehoods. When applying strict scrutiny, the government’s restriction “must be the least restrictive means among *available, effective* alternatives.” *Alvarez*, 132 S.Ct. at 2551 (emphasis added) (quotation omitted). Unlike in *Alvarez*, where a plurality of the Court struck down a law prohibiting anyone from falsely claiming to be a medal-of-honor recipient because evidence in that case showed that “counterspeech, ... [and] refutation, can overcome the lie,” *id.* at 2549, that lie-defeating solution is inadequate here. At stake in *Alvarez* was the dishonest speaker’s reputation; at stake under the statute in this case is an accurately informed electorate. The state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections. Clayton’s as-applied challenge fails.

*Niska*, 2014 WL 902680, at \*10.

76. In other words, the court accepted an argument that the Eighth Circuit would go on to reject a few months later in *281 Care Committee*: that counter-speech is inadequate to remedy false speech about election campaigns or ballot questions. *Compare Niska*, 2014 WL 902680, at \*10 (opinion filed Mar. 10, 2014), *with 281 Care Comm.*, 766 F.3d at 793–94 (opinion filed Sept. 2, 2014).

77. This complaint’s next subsections—the subsections about *City of Grant v. Smith* and *Linert v. MacDonald*—will show that the court continued to adhere to this flawed reasoning even after the Eighth Circuit’s decision on the merits in *281 Care Committee*.

78. The Minnesota Supreme Court denied Clayton’s petition for review. *Niska*, 2014 WL 902680, *rev. denied* (Minn. 2014). Later, the U.S. Supreme Court denied his petition for writ of certiorari. *Clayton v. Niska*, 135 S.Ct. 1399 (2015).

79. Clayton plans to continue his political activity, but has changed the content of his political speech for fear of again being accused of violating § 211B.02.

#### **B. *City of Grant v. Smith*.**

80. In *City of Grant v. Smith*, the Minnesota Court of Appeals upheld an OAH order imposing a civil penalty on nonplaintiff John Smith for distributing a campaign flyer and campaign brochure that resembled the City of Grant, Minnesota’s newsletters and some other city documents. No. A16–1070, 2017 WL 957717 (Minn. Ct. App. Mar. 13, 2017), *rev. denied* (May 30, 2017). A copy of the Court of Appeals’ opinion is attached as Exhibit 5.

81. An OAH three-judge panel found that the flyer and brochure—both of which urged specific votes on ballot questions—violated § 211B.02 because the documents’ designs

and wordings suggested that they were issued by the city even though they were not issued by the city. *City of Grant*, 2017 WL 957717, at \*2–3.

82. The panel imposed a penalty even though the flyer and brochure did not explicitly say that they were issued by the city, and even though the documents correctly identified the organization that issued them—a campaign committee of which Smith was a member. *See id.*

83. Before the panel had even conducted an evidentiary hearing, Smith had moved to dismiss the complaint against him on the ground that § 211B.02 violated the First Amendment, but the motion was denied by the ALJ who heard it. Order Mot. Dismiss, *City of Grant v. Smith*, OAH 8-0325-33077 (Minn. OAH Apr. 29, 2016). A copy of the ALJ’s order denying the motion to dismiss is attached as Exhibit 6.

84. In his order, the ALJ noted that Smith relied on *281 Care Committee*, but the ALJ ruled that § 211B.02, unlike § 211B.06, is narrowly tailored. *Id.* at 4–6, 7.

85. The ALJ relied on several cases to support his conclusion that § 211B.02 is constitutional, but his analysis was confused, superficial, and incomplete. *See id.* at 5–7. The ALJ quoted *Alvarez* for a list of exceptions to the First Amendment’s prohibition on content-based speech restrictions, and the ALJ placed the words “defamation” and “fraud” in bold, thus suggesting that the speech proscribed by § 211B.02 is within one of those exceptions. *Id.* at 6 (quoting *Alvarez*, 567 U.S. at 717 (plurality opinion)). But the ALJ did not rule that the campaign literature distributed by Smith was either defamatory or fraudulent, let alone explain the basis for such a ruling. *See id.* at 6–7. Nor did the ALJ acknowledge that false campaign speech is conspicuously absent from *Alvarez*’s list of exceptions. *See id.* Furthermore, the ALJ never considered whether *Alvarez*’s holding might protect the campaign literature distributed by Smith. *See id.* Indeed, the ALJ’s order leaves the reader in doubt about whether the ALJ realized why

*Alvarez* is on point: the case stands for the proposition that, outside of narrow exceptions, the First Amendment protects false speech. *Compare id., with Alvarez*, 567 U.S. at 721–22 (plurality opinion), *and id.* at 732 (Breyer, J., concurring).

86. The ALJ observed that “proscriptions that forbid the intentional infliction of emotional distress by means of a false statement, enjoy [widespread] acceptance, notwithstanding the fact that the underlying tort was not recognized until decades after adoption of the First Amendment,” a proposition for which the ALJ cited *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Order Mot. Dismiss at 6–7, 7 n.25, *City of Grant*, OAH 8-0325-33077. But the ALJ did not explain the relevance of intentional-infliction-of-emotional-distress law’s constitutionality beyond saying that the tort was constitutionally permissible “in order to protect against significant injury to highly personalized interests” and that the city “has a substantial interest in . . . avoiding the appearance that it is supporting particular results from the balloting.” *Id.* at 7.

87. After the evidentiary hearing, the three-judge panel issued its Findings of Fact, Conclusions of Law, and Order, which imposed a penalty on Smith. *City of Grant*, 2017 WL 957717, at \*2–3. Smith appealed the panel’s order to the Minnesota Court of Appeals. *Id.* at \*3.

88. In his principal brief to the Court of Appeals, Smith invoked *281 Care Committee* and *Alvarez* to support the contention that § 211B.02 is unconstitutional. Relators’s [sic] Brief and Addendum at \*27–28, *City of Grant*, No. A16–1070, 2016 WL 6649006. A copy of this brief is attached as Exhibit 7.

89. In its response brief, the City of Grant argued that *281 Care Committee* was distinguishable because § 211B.02 “is more narrowly tailored than 211B.06 and therefore passes strict scrutiny.” Respondent’s Brief and Addendum at \*17–18, *City of Grant*, No. A16–1070,

2016 WL 6649007. A copy of this brief is attached as Exhibit 8. This brief failed to discuss *Alvarez*.

90. In his reply brief, Smith again invoked *281 Care Committee*. Relators's [sic] Reply Brief at \*13–14, *City of Grant*, No. A16–1070, 2016 WL 6649008. A copy of this brief is attached as Exhibit 9.

91. The Court of Appeals upheld the OAH decision against Smith's First Amendment challenge. *City of Grant*, 2017 WL 957717, at \*7–8.

92. Despite the briefing from both parties on *281 Care Committee*'s relevance, despite Smith's reliance on *Alvarez*, and despite the ALJ's discussion of both *281 Care Committee* and *Alvarez*, the Court of Appeals' opinion does not contain a single reference to either case. *See City of Grant*, 2017 WL 957717.

93. The Court of Appeals considers itself not bound by Eighth Circuit interpretations of federal law. *See, e.g., Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003) (stating that although the Court of Appeals is bound by U.S. Supreme Court decisions regarding federal law, the Court of Appeals is not “bound by any other federal courts’ opinion, even when interpreting federal statutes”). But the Court of Appeals has traditionally regarded U.S. Circuit Court opinions as persuasive authority that “should be afforded due deference.” *Id.*

94. In *City of Grant*, the Court of Appeals departed from the norm of at least examining relevant circuit court decisions because the Court of Appeals made no effort to engage the most relevant circuit court precedent that existed, i.e., *281 Care Committee*, a decision that invalidated a parallel section of ch. 211B.

95. Furthermore, there is no dispute that U.S. Supreme Court decisions interpreting the U.S. Constitution bind state courts. Yet, in *City of Grant*, the Court of Appeals refused to discuss even the possible relevance of *Alvarez*, a Supreme Court case about First Amendment protection for false speech.

**C. Michelle MacDonald.**

96. In 2014, MacDonald lost in the general election for Justice of the Minnesota Supreme Court after having been endorsed by the Republican Party of Minnesota state convention.

97. MacDonald was also a candidate for a seat on the Minnesota Supreme Court in the November 8, 2016 general election.

98. The Republican Party of Minnesota's judicial election committee invited her to seek the party's endorsement before the party's next state convention, which was held on May 20–21, 2016.

99. The judicial election committee was a 22-member state-convention committee.

100. The judicial election committee was one of several temporary, convention-specific committees that was created to help in carrying out the state convention's work.

101. According to the party's rules at the time, the judicial election committee did not have the power to endorse a candidate, but the committee did have the power to recommend that the state-convention delegates endorse a candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals.

102. The state-convention delegates had the power to confer the party's endorsement on a candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals.

103. The committee voted 20 to 2 in favor of recommending that the state-convention delegates endorse MacDonald.

104. Under the party's rules at the time, after the committee issued its report, the state-convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court or the Minnesota Court of Appeals. If a majority of the delegates voted in favor of considering endorsements, then the delegates were to vote on whether to endorse specific candidates for seats on the courts.

105. After presentation of the committee's majority report recommending that MacDonald be endorsed, and presentation of a minority report recommending against her endorsement, the delegates voted against endorsing any candidates for the Minnesota Supreme Court or the Minnesota Court of Appeals.

106. So the Republican Party of Minnesota convention did not endorse MacDonald as a candidate in the 2016 election.

107. Sometime before October 18, 2016, MacDonald submitted information to the *Star Tribune* newspaper for her candidate profile. In her submission's "Endorsements" section, she claimed that she was endorsed by the "GOP's Judicial Selection Committee 2016."

108. On or after October 18, 2016, the *Star Tribune* posted her candidate profile in the "Voter Guide" section of the paper's website.

109. Her profile's "Endorsements" section initially claimed that she was endorsed by the "GOP's Judicial Selection Committee 2016."

110. The Republican Party of Minnesota did not have a "judicial selection committee," but, as explained, it did have a "judicial election committee."

111. On or about October 21, 2016, MacDonald became aware of public criticism of her profile's claim of endorsement by the "GOP's Judicial Selection Committee 2016."

112. On October 21, 2016, MacDonald went to the *Star Tribune*'s offices and requested that the paper remove from her candidate profile the claim of endorsement by the judicial selection committee.

113. On or shortly after October 21, 2016, the *Star Tribune* removed from MacDonald's candidate profile the claim of endorsement by the judicial selection committee.

114. Despite the removal, on October 25, 2016, Barbara J. Linert and Steven J. Timmer filed with the Office of Administrative Hearings a complaint in which they alleged that MacDonald had violated § 211B.02 by claiming to be endorsed by the judicial selection committee. A copy of the complaint is attached as Exhibit 10.

115. On December 27, 2016, an OAH three-judge panel issued its Findings of Fact, Conclusions of Law, and Order in which the panel ruled that MacDonald "knowingly violated Minn. Stat. § 211B.02 by falsely claiming to be endorsed by the 'GOP Judicial Selection Committee 2016'" and ordered MacDonald to pay a \$500 civil penalty. A copy of the Findings of Fact, Conclusions of Law, and Order is attached as Exhibit 11.

116. MacDonald timely appealed the panel's order to the Minnesota Court of Appeals.

117. In her principal brief, a copy of which is attached as Exhibit 12, MacDonald challenged the constitutionality of § 211B.02 on First Amendment grounds. Relator's Principal Brief ("MacDonald Principal Brief") at \*6, \*8–19, *Linert*, 901 N.W.2d 664 (No. A17-0127), 2017 WL 2979580. She argued that, under *281 Care Committee*, the section was subject to strict scrutiny and was not narrowly tailored. MacDonald Principal Brief at \*6, \*9–10, \*12–19.

118. The respondents argued in their response brief that *281 Care Committee* is nonbinding and also distinguishable. Brief of Respondents Barbara Linert and Steven Timmer at \*31–34, *Linert*, 901 N.W.2d 664 (No. A17-0127), 2017 WL 2979581. A copy of this brief is attached as Exhibit 13.

119. In her reply brief, MacDonald again invoked *281 Care Committee*. Relator’s Reply Brief (“MacDonald Reply Brief”) at \*3 n.12, *Linert*, 901 N.W.2d 664 (No. A17-0127), 2017 WL 2979582. A copy of this brief is attached as Exhibit 14.

120. On September 11, 2017, the Minnesota Court of Appeals issued an opinion affirming the OAH’s order. *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017). A copy of the opinion is attached as Exhibit 15.

121. Although MacDonald had repeatedly invoked *281 Care Committee* in her principal brief, MacDonald Principal Brief at \*5–6, \*15–18, and invoked it again in her reply brief, MacDonald Reply Brief at \*3 n.12, the Court of Appeals never mentioned the case in its opinion, *see Linert*, 901 N.W.2d at 666–70.

122. The court agreed that § 211B.02 is a content-based restriction subject to strict scrutiny. *Id.* at 667–68.

123. But, the court misapplied the strict-scrutiny test by suggesting that MacDonald bore the burden of showing that counter-speech is a less restrictive means of combatting false claims of support or endorsement: “MacDonald has not demonstrated, and we are not persuaded, that counterspeech—even media statements and retractions—is an effective alternative means to combat false claims of support or endorsement. This is particularly true with respect to false claims made in the final days leading up to an election.” *Id.* at 670.

124. But, under strict scrutiny, MacDonald does not bear the burden of showing that counter-speech is sufficient; the government bears the burden of showing that counter-speech is insufficient. *See, e.g.*, *281 Care Committee*, 766 F.3d at 785 (“Applying strict scrutiny, the burden on [the county attorneys] in this matter is to demonstrate that the interest advanced in support of the § 211B.06 is narrowly tailored to meet a compelling government interest”); *id.* at 793–94 (finding § 211B.06 unconstitutional because the county attorneys had failed to show that counter-speech is inadequate to counter deceptive campaign speech).

125. Moreover, the Court of Appeals’ determination that counter-speech is not “an effective alternative means to combat false” campaign speech “in the final days leading up to an election,” *Linert*, 901 N.W.2d at 670, is directly contrary to the Eighth Circuit’s determination in *281 Care Committee* that yes, counter-speech is effective for exactly that, 766 F.3d at 793–94. Although the Court of Appeals did not discuss *281 Care Committee*, the court did invoke its own unpublished—and hence nonbinding—opinion in *Niska v. Clayton* to dismiss the notion that counter-speech is an effective remedy. *Linert*, 901 N.W.2d at 669 (citing *Niska*, 2014 WL 902680, at \*10).

126. Nor is that the only way in which *Linert* deviates from *281 Care Committee*. In her principal brief, MacDonald invoked *281 Care Committee* to support her contentions (1) that the threat of an accusation of having violated § 211B.02 chills protected speech, and (2) that § 211B.02, like § 211B.06, “perpetuates ‘the very fraud it is allegedly designed to prohibit.’” MacDonald Principal Brief 15 (quoting *281 Care Committee*, 766 F.3d at 789). The Court of Appeals rejected MacDonald’s concern about § 211B.02’s chilling effect out of hand and found that ch. 211B’s enforcement procedures are adequate to protect against retaliatory complaints. *Linert*, 901 N.W.2d at 670 (citing Minn. Stat. §§ 211B.32–35). But, the Eighth Circuit had not

only already found these enforcement procedures to be inadequate to avoid an impermissible chilling effect, but had characterized them as a partial explanation for why § 211B.06 has an impermissible chilling effect. *281 Care Committee*, 766 F.3d at 789–92, 795–96.

127. In short, the Court of Appeals adopted the very arguments that the Eighth Circuit had rejected in *281 Care Committee*. Compare *Linert*, 901 N.W.2d at 669–70, with *281 Care Committee*, 766 F.3d at 789–96. *Linert* cannot be reconciled with *281 Care Committee*, and the Court of Appeals’ opinion is especially troubling because the court did not even attempt either to distinguish the Eighth Circuit case or to give a reason for rejecting its reasoning. Again, the *Linert* opinion contains not a single reference to *281 Care Committee*, despite MacDonald’s repeated reliance on that case.

128. MacDonald plans to run for public office in 2020 and in the future.

129. Unless § 211B.02 is invalidated, MacDonald will not use her 2014 Republican Party of Minnesota endorsement in any future campaign for fear of again being accused of violating § 211B.02. In particular, she is concerned that even if she specifies that the Republican Party of Minnesota endorsed her for the 2014 campaign, someone will accuse of her of falsely implying that the party is supporting her in a campaign contemporaneous with her claim of support. Section 211B.02 is thus deterring MacDonald from stating a historical fact in the context of political speech.

#### **D. Don Evanson.**

130. Evanson has been a long-time GOP political activist.

131. Evanson advocated that, for the 2016 elections, local Republican Party of Minnesota party organizations should hold a convention to endorse candidates for Minnesota district-court judgeships.

132. A dispute arose during the 2016 election campaigns about whether the Republican Party of Minnesota state executive committee would pay for the mailing of convention notices for the local judicial-candidate endorsing convention or whether local party organizations holding the convention would need to pay for mailing the notices themselves.

133. When the state party balked at paying the expense, the local party officials considered going ahead with the judicial-endorsing convention anyway by using e-mail, fax, and phone notices.

134. But the local party officials became concerned if they used one or more of these alternative methods of giving notice, then the state party would declare the local judicial-endorsing convention illegitimate for lack of mailed notices.

135. If the local convention were declared illegitimate, then anybody who claimed support or endorsement of a local party organization based on the convention would risk liability under § 211B.02 on the theory that the illegitimate convention's endorsement was not really an endorsement. A person who said, truthfully, that a local convention had said that it endorsed a candidate for office could be held liable for falsely claiming endorsement on the theory that the convention lacked the authority to endorse. Indeed, the participants in the contested convention could themselves face liability under the same theory: if they did what people do at an endorsing convention and said that they endorsed a candidate, they could face liability if a tribunal ruled that they lacked authority to endorse.

136. In other words, § 211B.02 has the potential to impose civil and criminal liability on a person for making a good-faith mistake about a political organization's internal rules.

137. For these reasons, Evanson, as a local party official, ultimately changed his mind and decided not to support holding the local convention. So fear of an accusation of violating §

211B.02 did not merely deter Evanson from saying something; the fear actually caused him to alter the content of his political advocacy and indeed to change his political activity in the 2016 election campaigns.

138. Evanson plans to continue to politically advocate in 2020 and beyond, but has changed the content of his political speech for fear of being accused of violating § 211B.02.

**E. Vincent Beaudette and the Vince for Statehouse Committee—2018 election.**

139. The local Republican Party of Minnesota organization endorsed Beaudette for election to Minnesota State House seat 47B in the June 20, 2018 election.

140. On August 14, 2018, Beaudette lost the Republican primary for Minnesota State House seat 47B.

141. Nonetheless, Beaudette, with the support of the Vince for Statehouse Committee, campaigned for election as a write-in candidate in the November 6, 2018 general election.

142. During the general-election campaign, Beaudette and Vince for Statehouse Committee refrained from using the local Republican Party of Minnesota endorsement for fear of being accused of violating § 211B.02.

143. Individual Republicans have successfully brought accusations of § 211B.02 violations similar to the accusations feared by Beaudette and Vince for Statehouse Committee, e.g., against Michelle MacDonald and Bonn Clayton.

144. Unless § 211B.02 is invalidated, Beaudette and Vince for Statehouse Committee, for fear of being accused of violating § 211B.02, will not use the local-party 2018-election endorsement in future campaigns.

**F. Minnesota RFL Republican Farmer Labor Caucus—2020 election.**

145. Minnesota RFL would like to endorse political candidates in 2020.

146. But Minnesota RFL currently plans not to endorse political candidates in the 2020 campaigns for fear of someone accusing Minnesota RFL—or a candidate that it has endorsed or a candidate’s election committee—of violating § 211B.02 on the theory that a claim of endorsement by the Minnesota RFL falsely implies endorsement by somebody else.

147. In particular, Minnesota RFL is concerned that the Minnesota DFL Party or somebody else will accuse Minnesota RFL—or a candidate that it has endorsed or a candidate’s election committee—of falsely implying the support or endorsement of the Minnesota DFL Party.

148. Minnesota RFL is also concerned that its support or endorsement will result in an allegation of falsely implying the support or endorsement of the Republican Party of Minnesota or the United States Republican Party.

149. Section 211B.02’s is thus deterring Minnesota RFL from engaging in political speech that directly furthers of its main purposes: supporting certain candidates for office and certain ballot proposals.

**Plaintiffs’ Political Activities**

150. Individual Plaintiffs and association Plaintiffs propose to engage in political expression as allowed by the First Amendment to inform, to activate, and to influence voters’ decisions regarding political issues, including elections and ballot referendums through various communicative methods, including:

- a. sending letters or other types of correspondence to individuals affected to inform them of the Plaintiffs’ beliefs, interpretations, opinions, or positions;

- b. inviting individuals or candidates for elective office to attend events to speak on political issues, to agitate discussion, to encourage thoughtfulness and reflection, and to influence through the expression of opinion, interpretation, belief, or position;
- c. creating and distributing brochures or other political campaign material reflecting opinion, interpretation, belief, or position to encourage political discourse, reflection, and discussion;
- d. sending email, text messages, or other digital messages over the Internet or cell-phones to express opinion, interpretation, belief, or position and to encourage political discourse and to influence a voter's decision-making process on school district proposals or candidate selections;
- e. creating and distributing advertisements through radio, television, or newspapers to advocate political opinion, interpretation, belief, or position and to encourage political discourse;
- f. creating and distributing recorded messages to advocate a particular position on political issues or a candidate's integrity or qualifications to those holding similar beliefs, opinions, interpretations, or positions as those of one or more of the Plaintiffs;
- g. attending events to express, in response to a call for knowledge or opinions, the Plaintiffs' interpretations, beliefs, or positions;
- h. writing letters to the editor for publication to advocate an opinion, belief, interpretation, or position on election or political issues, candidate integrity or qualifications; and
- i. using the communicative activities listed above to influence voters' decision-making on topics such as foreign and domestic policies, local policies, school district

proposals, including but not limited to school-bond levy referenda, and candidate integrity and qualifications.

151. Although the Plaintiffs still seek to engage in some political activities, each fears prosecution and penalties under § 211B.02’s first sentence, notwithstanding the fact that the activities are protected political speech under the First Amendment. So, all the Plaintiffs have curtailed and will curtail their political activities in the 2020 election campaign and beyond.

152. The individual Plaintiffs desire to support or endorse candidates for office or ballot proposals. The individual Plaintiffs desire that others be able to disseminate knowledge, through writing, of an individual Plaintiff’s support or endorsement, without the hassle of the supporter or endorser providing a written permission slip to the person doing the disseminating as required by § 211B.02’s second sentence. All the Plaintiffs—both the individuals and the organizations—desire to disseminate, through writing, knowledge of individuals’ support or endorsement of candidates for office or ballot proposals, without the hassle of first obtaining a permission slip from the supporter or endorser as required by § 211B.02’s second sentence.

## Claims

### **Count 1: Minn. Stat. § 211B.02’s first sentence violates the First Amendment right to free speech because the sentence is a content-based restriction that fails strict scrutiny.**

153. The Plaintiffs incorporate this complaint’s previous paragraphs.

154. Speech relating to support or endorsement for a candidate or ballot proposal, like speech relating to other election or campaign issues, is core political speech that is constitutionally protected under the First Amendment’s Free Speech Clause, which applies to the states through the Fourteenth Amendment.

155. A law that restricts core political speech—such as speech about election campaigns or ballot referenda—and that is content-based, is subject to strict scrutiny and is unconstitutional unless the law is narrowly tailored to serve a compelling state interest. *E.g., 281 Care Comm.*, 766 F.3d at 784–85.

156. Section 211B.02’s first sentence explicitly restricts what people can say about candidates for office and about ballot referenda: the sentence prohibits making a false claim of support or endorsement for a candidate or ballot proposal.

157. Because the sentence prohibits affirming certain categories of political statements, the sentence is not view-point neutral. On the contrary, enforcement requires the state to take a position regarding the truth or falsehood of certain political claims.

158. Section 211B.02’s first sentence does not serve a compelling state interest. Even eliminating outright malicious lies regarding claims of support or endorsement for candidates or ballot proposals is not on the same level of importance as paradigmatic examples of compelling state interests such as preventing a war of all against all or preventing conquest by a foreign invader. Society can go on functioning—and be quite nice—even with people fibbing about support or endorsement for candidates and ballot proposals.

159. Section 211B.02’s first sentence is not narrowly tailored. On the contrary, the sentence is both underinclusive and overbroad.

160. The sentence is underinclusive because, although it prohibits false claims of support or endorsement for candidates or ballot proposals, it does not prohibit false claims of opposition for candidates or ballot proposals. A person may, without violating the sentence, falsely claim that a party, party unit, or organization opposes a candidate or ballot proposal. If the sentence’s publicly understood purpose is to prevent false speech regarding the positions that

parties, party units, and organizations have taken regarding candidates or ballot proposal, then the sentence fails to prohibit a big chunk of the speech in exactly that category. There is no legitimate reason for prohibiting false claims of support or endorsement, but not false claims of opposition.

161. The sentence is also underinclusive because it does not apply to claims of support or endorsement by individuals.

162. The sentence is overbroad because it bans, deters, and chills constitutionally protected political speech about election and ballot campaigns.

163. In general, false speech is constitutionally protected. *Alvarez*, 567 U.S. at 715–22, 724 (2012) (plurality opinion) (advocating strict scrutiny for prohibitions of false speech outside of narrow traditional categories, such as fraud, perjury, defamation, and lying to the government); *id.* at 732 (Breyer, J., concurring) (advocating intermediate scrutiny for prohibitions on false speech about “easily verifiable facts,” if the facts are outside of certain categories deserving heightened protection). Prohibitions on false political speech, like other content-based restrictions on political speech, are subject to strict scrutiny. *281 Care Comm.*, 766 F.3d at 784 (explaining that, under the *Alvarez* plurality opinion and concurring opinion, strict scrutiny continues to apply to prohibitions on false *political* speech—which it already did under earlier Supreme Court precedents).

164. Section 211B.02’s first sentence makes the government the arbiter of the truth of claims of support or endorsement—claims that, like other speech about political campaigns, voters can and do evaluate for themselves. *See 281 Care Comm.*, 766 F.3d at 793 (“It is the citizenry that can discern for themselves what the truth is, not an ALJ behind doors.”).

165. Minnesota has less restrictive means of discouraging false speech about support or endorsement for candidates or ballot proposals than enforcement of chapter 211B, just as Minnesota has less restrictive means of discouraging the false statements prohibited by § 211B.02. *See 281 Care Comm.*, 766 F.3d at 793–94. For one thing, Minnesota can simply permit counter-speech so that people can expose others’ false statements. *See id.*

166. And MacDonald’s story illustrates the effectiveness of counter-speech: criticism of her claim of having been endorsed by the Republican 2016 “Judicial Selection Committee” prompted her to withdraw the claim before anyone filed a complaint with the OAH.

167. Furthermore, Minnesota can itself engage in counter-speech. If the state believes that a person has made a false claim of support or endorsement, the state can educate its citizens about the falsehood “with a public-information campaign.” *Nat'l Inst. of Family Life Advocates v. Becerra (NIFLA)*, 138 S.Ct. 2361, 2376 (2018) (citing *Riley v. Nat'l Fed'n of Blind of N. C.*, 487 U.S. 781, 800 (1988)) (invalidating as not narrowly-tailored a requirement that health clinics inform patients about the availability of certain publicly-provided health services because the state could itself inform its citizens).

168. It might seem strange for the state to take an official position regarding the truth of a claim of support or endorsement by a nongovernmental organization, but the state does exactly that by adjudicating allegations of false claims.

169. If Minnesota must use a judicial enforcement mechanism, it could use one much less broad than chapter-211B procedures, which authorize anyone to bring a complaint against anyone else for an allegedly false statement, and which hence empower everybody to use administrative proceedings to harass everybody else.

170. Section 211B.02's first sentence's infringement on the First Amendment right to free speech extends beyond prohibiting false, but protected speech. The section also chills and deters—and even allows for the punishment of—*truthful* political speech.

171. As the cases of Clayton, MacDonald and Evanson illustrate, knowing whether a particular organization has, in fact, endorsed a candidate is not necessarily an easy matter because the answer depends on the organization's own internal rules, which may be technical and complicated. A person can mistake a decision by a subunit or sub-body of an organization for the decision of the organization (or for the decision of a higher-level unit or body). The possibility of civil and criminal penalties for violating § 211B.02's first sentence may deter a person from making a truthful claim about support or endorsement, out of fear that the claim might be mistaken.

172. Although violation of § 211B.02's first sentence requires knowledge of falsity, a person can be accused of knowingly making a false statement, even if the person just made an innocent mistake (or, for that matter, even if the person told the truth). *See 281 Care Comm.*, 766 F.3d at 794 (explaining why § 211B.06's mens rea element is insufficient to prevent a chilling effect).

173. Furthermore, even if a person is confident that a claim of support or endorsement is demonstrably truthful, § 211B.02's first sentence still gives the person cause for concern, and thus chills protected speech. This is because § 211B.02's first sentence, like the invalidated Ohio Rev. Code § 3517.21(B)(9)–(10) and Minn. Stat. § 211B.06, creates a risk of retaliatory complaints against campaign speech, even if the speech is true. *See SBA List*, 134 S.Ct. at 2345; *SBA List*, 814 F.3d at 474 (citing *SBA List*, 134 S.Ct. at 2345, 2346); *281 Care Comm.*, 766 F.3d at 790 (citing *SBA List*, 134 S.Ct. at 2345); *id.* at 794 (citing *Alvarez*, 132 S.Ct. at 2555 (Breyer,

J., concurring)). By making a public assertion about support or endorsement—true or false—a person exposes themselves to the risk that someone will file an administrative complaint, and that the speaker will thus bear the costs of defending against the complaint even if the allegedly false assertion is true. *See 281 Care Comm.*, 766 F.3d at 790, 794.

174. And, the public complaint and administrative proceeding may create the appearance of wrongdoing even if the person accused is innocent—and this appearance may influence voters in an election or referendum that occurs before the proceeding is completed and thus before the person accused had an opportunity to be vindicated. *See id.* at 792, 794. An OAH finding that the person accused said nothing untrue may come too late, even after the election. *See id.*

175. Perhaps more frighteningly still, if the OAH sustains the complaint, then the person accused becomes liable not only to a fine, but also to criminal prosecution and, upon conviction, criminal punishment. Minn. Stat. §§ 211B.16, subd. 3, 211B.19, 211B.35, subd. 2, 2(d)–(e), 609.03 (providing for punishment for crimes for which no other punishment is provided), 609.03(3) (describing the punishment for a misdemeanor), 609.015, subd. 2 (providing that chapter 609 applies to crimes created by other provisions of the Minnesota Statutes). And, as with other criminal laws, wrongful convictions are possible. Minn. Stat. § 211B.02’s first sentence creates a possibility that an innocent person will be fined and jailed, either because of an incorrect determination of the truth of the person’s statement, or because the trier of fact will treat an honest mistake as a knowing falsehood. *See Minn. Stat. § 609.03(3)* (providing for a jail sentence or a fine as the punishment for a misdemeanor).

176. Furthermore, a person accused of violating § 211B.02’s first sentence bears the cost of defending against the accusation even if the complaint is dismissed or the person is acquitted. The risk of the expense of defending oneself is enough to chill protected speech.

177. Prosecution under § 211B.02’s first sentence is a realistic danger that significantly compromises the ability of Minnesotans to freely express their political beliefs and opinions.

178. That danger risks chilling the Plaintiffs’ and others’ constitutionally protected political speech, even if nobody is ever prosecuted for violating the section.

179. Section 211B.02’s first sentence has restricted, chilled, or banned the Plaintiffs’ free speech activities.

180. Under 28 U.S.C. § 2201(a), this Court “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

181. The Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201(a) that Minn. Stat. § 211B.02’s first sentence is unconstitutional under the First and Fourteenth Amendments.

182. A declaratory judgment will serve a useful purpose in settling this complaint’s constitutional challenges to Minn. Stat. § 211B.02’s first sentence.

183. A declaratory judgment will terminate, and afford relief from, the threat, uncertainty, and insecurity of § 211B.02’s first sentence.

184. The Plaintiffs are further entitled to a permanent injunction against all the Defendants to prevent the civil and criminal enforcement of § 211B.02’s first sentence.

185. The Defendants’ violations of the Plaintiffs’ constitutional rights have resulted in damages and this Court should grant all relief available under 28 U.S.C. § 1983.

**Count 2: Minn. Stat. § 211B.02's first sentence violates the First Amendment right to expressive association.**

186. The Plaintiffs incorporate this complaint's previous paragraphs.

187. The First Amendment's guarantee of freedom of speech and other enumerated freedoms includes a right to expressive association: “‘implicit in the right to engage in activities protected by the First Amendment’ is ‘a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’” *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). “[I]ntrusion into the internal structure or affairs of an association” can violate the right to expressive association. *Id.* at 648 (quoting *United States Jaycees*, 530 U.S. at 623).

188. A law burdening expressive association is subject to strict scrutiny. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Dale*, 530 U.S. at 680 (Stevens, J., dissenting) (citing *United States Jaycees*, 468 U.S. at 623) (dissenting from application of the expressive-association doctrine, but conceding that a law burdening the right to expressive association must be the least restrictive means of achieving a compelling state interest).

189. As already explained, § 211B.02's first sentence makes an organization's support or endorsement of a candidate or ballot proposal legally risky because the organization exposes itself to the accusation that it is falsely implying support or endorsement by some other organization, organization unit, or person. And this can be true where the candidate that the organization is supporting or endorsing is a member of the organization.

190. Likewise, § 211B.02's first sentence makes a candidate's claim of support or endorsement by an organization legally risky because the candidate exposes themselves to the accusation that they are falsely implying support or endorsement by some other organization,

organization unit, or person. And this can be true where the candidate is a member of the organization whose support or endorsement the candidate is truthfully claiming.

191. Indeed, as explained, § 211B.02's first sentence makes any claim of support or endorsement risky because anybody can bring a complaint alleging that the claim of support or endorsement is false—or implies some kind of falsehood—even if the claim is true.

192. Section 211B.02's first sentence thus burdens organizations' ability to speak in support of their own members and burdens members' ability to claim the support or endorsement of organizations of which they are members.

193. Section 211B.02's first sentence thus burdens organizations' and members' ability to advance their causes through cooperation and through fully protected speech.

194. Section 211B.02's first sentence's burdens on the rights to expressive association and free speech are especially grave because many organizations support or endorse candidates for office. Indeed, some organizations have, as their primary purpose, the support or endorsement of candidates.

195. Section 211B.02's first sentence is thus subject to strict scrutiny as a burden on the right to expressive association.

196. Section 211B.02's first sentence unconstitutionally burdens the right to expressive association because the sentence is not narrowly tailored to meet a compelling state interest.

197. The Plaintiffs are thus entitled to a declaration under 28 U.S.C. § 2201(a) that Minn. Stat. § 211B.02's first sentence is unconstitutional under the First and Fourteenth Amendments. And the Plaintiffs are thus entitled to a permanent injunction against all the Defendants to prevent the civil and criminal enforcement of § 211B.02's first sentence.

**Count 3: Minn. Stat. § 211B.02's second sentence violates the First Amendment right to free speech because the sentence is a content-based restriction that fails strict scrutiny.**

198. The Plaintiffs incorporate this complaint's previous paragraphs.

199. Speech relating to support or endorsement for a candidate or ballot proposal, like speech relating to other election or campaign issues, is core political speech that is constitutionally protected under the First Amendment's Free Speech Clause, which applies to the states through the Fourteenth Amendment.

200. A law that restricts core political speech—such as speech about election campaigns or ballot referenda—and that is content-based, is subject to strict scrutiny and is unconstitutional unless the law is narrowly tailored to serve a compelling state interest. *E.g., 281 Care Comm.*, 766 F.3d at 784–85.

201. Section 211B.02's second sentence explicitly restricts what people can say about candidates for office and about ballot referenda: the sentence prohibits “[stating] in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.”

202. Because the sentence prohibits affirming certain categories of political statements, the sentence is not view-point neutral. On the contrary, the sentence imposes a special burden—the need for prior written consent—on a certain category of political speech.

203. Section 211B.02's second sentence does not serve a compelling state interest.

204. Section 211B.02's second sentence is not narrowly tailored. On the contrary, the sentence is both underinclusive and overbroad.

205. The sentence is underinclusive because, although it requires prior written consent for a claim of support or endorsement for a candidate or ballot proposal, it does not require any consent at all for a claim of opposition to a candidate or ballot proposal. A person may, without violating the sentence, state that an individual opposes a candidate or ballot proposal, even if the

person so stating lacks the individual's consent. If the sentence's publicly understood purpose is to prevent false speech regarding the positions that individuals have taken regarding candidates or ballot questions, then the sentence fails to prohibit a big chunk of the speech in exactly that category. There is no legitimate reason for requiring permission for a claim of support or endorsement, but not for a claim of opposition.

206. The sentence is also underinclusive because it does not apply to claims of support or endorsement by persons other than individuals.

207. The sentence is also underinclusive because it applies to only "*written* campaign material" (emphasis added), not to oral statements, even though oral statements can deceive people about support or endorsement. Nonapplicability to oral statements (other than in paid advertising) is one reason for § 211B.06's unconstitutional underinclusiveness. *281 Care Comm.*, 766 F.3d at 794–95. Section 211B.02's second sentence is unconstitutionally underinclusive for the same reason.

208. The sentence is also underinclusive because of an exception carved out by § 211B.01. That section contains definitions that apply to chapter 211B. Minn. Stat. § 211B.01, subd. 1. The section defines "[c]ampagin material" so as not to include "news items or editorial comments by the news media," *id.*, subd. 2, even though writings in these genres can deceive people about support or endorsement. This exception is one reason for § 211B.06's unconstitutional underinclusiveness. *281 Care Comm.*, 766 F.3d at 794–95. Section 211B.02's second sentence is unconstitutionally underinclusive for the same reason.

209. Section 211B.02's second sentence is overbroad because it bans, deters, and chills constitutionally protected political speech about election and ballot campaigns.

210. In general, false speech is constitutionally protected. *United States v. Alvarez*, 567 U.S. 709, 715–22, 724 (2012) (plurality opinion) (advocating strict scrutiny for prohibitions of false speech outside of narrow traditional categories, such as fraud, perjury, defamation, and lying to the government); *id.* at 732 (Breyer, J., concurring) (advocating intermediate scrutiny for prohibitions on false speech about “easily verifiable facts,” if the facts are outside of certain categories deserving heightened protection). Prohibitions on false political speech, like other content-based restrictions on political speech, are subject to strict scrutiny. *281 Care Comm.*, 766 F.3d at 784 (explaining that, under the *Alvarez* plurality opinion and concurring opinion, strict scrutiny continues to apply to prohibitions on false *political* speech—which it already did under earlier Supreme Court precedents).

211. If § 211B.02’s second sentence’s purpose is to protect against false political speech, then it is overbroad because, in general, false political speech is not only protected, but is afforded the highest level of constitutional protection.

212. Minnesota has less restrictive means of discouraging false speech about support or endorsement for candidates or ballot proposals than enforcement of chapter 211B, just as Minnesota has less restrictive means of discouraging the false statements prohibited by § 211B.02. *See 281 Care Comm.*, 766 F.3d at 793–94. For one thing, Minnesota can simply permit counter-speech so that people can expose others’ false statements. *See id.*

213. Furthermore, Minnesota can itself engage in counter-speech. If the state believes that a person has made a false claim of support or endorsement, the state can educate its citizens about the falsehood “with a public-information campaign.” *NIFLA*, 138 S.Ct. at 2376 (citing *Riley*, 487 U.S. at 800) (invalidating as not narrowly-tailored a requirement that health clinics

inform patients about the availability of certain publicly-provided health services because the state could itself inform its citizens).

214. Moreover, § 211B.02's second sentence does not directly prohibit false speech. Instead, the sentence requires prior written consent before making certain types of assertions—and the sentence imposes this requirement regardless of whether the assertion for which consent is required is true or false. *See* Minn. Stat. § 211B.02. The truth is no defense to a failure to obtain the requisite permission. *See id.*

215. This means that one can violate the sentence—and thus be liable to a civil penalty, a fine, and jail time—by making a factually accurate statement about politics. *See* Minn. Stat. §§ 211B.02, 211B.16, subd. 3, 211B.19, 211B.35, subd. 2, 2(d)–(e), 609.03 (providing for punishment for crimes for which no other punishment is provided), 609.03(3) (describing the punishment for a misdemeanor), 609.015, subd. 2 (providing that chapter 609 applies to crimes created by other provisions of the Minnesota Statutes).

216. Nothing in Minnesota law requires an individual to give the consent that, under § 211B.02, is a prerequisite for making a claim of support or endorsement. An individual may publicly announce support or endorsement for a candidate or ballot proposal, and then deny permission to people to point out in written campaign material that the individual said what the individual said. Under § 211B.02, this denial is an absolute bar to stating a plain—and possibly important—fact in written campaign material.

217. Furthermore, a person accused of violating § 211B.02's second sentence bears the cost of defending against the accusation even if the complaint is dismissed or the person is acquitted. The risk of the expense of defending oneself is enough to chill protected speech.

218. Prosecution under § 211B.02's second sentence is a realistic danger that significantly compromises the ability of Minnesota citizens to freely express their political beliefs, opinions, and interpretations.

219. Section 211B.02's second sentence has restricted, chilled, or banned the Plaintiffs' free speech activities.

220. The Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201(a) that Minn. Stat. § 211B.02's second sentence is unconstitutional under the First and Fourteenth Amendments.

221. A declaratory judgment will serve a useful purpose in settling this complaint's constitutional challenges to Minn. Stat. § 211B.02's second sentence.

222. A declaratory judgment will terminate, and afford relief from, the threat, uncertainty, and insecurity of § 211B.02's second sentence.

223. The Plaintiffs are further entitled to a permanent injunction against all the Defendants to prevent the civil and criminal enforcement of § 211B.02's second sentence.

224. The Defendants' violations of the Plaintiffs' constitutional rights have resulted in damages and this Court should grant all relief available under 28 U.S.C. § 1983.

**Count 4: Minn. Stat. § 211B.02's second sentence violates the First Amendment right to free speech because the sentence is an impermissible prior restraint.**

225. The Plaintiffs incorporate this complaint's previous paragraphs.

226. Section 211B.02's second sentence is an impermissible prior restraint because it requires, as a prerequisite for making certain political statements that are core political speech, prior permission to make those statements.

227. The Plaintiffs are thus entitled to a declaration under 28 U.S.C. § 2201(a) that Minn. Stat. § 211B.02's second sentence is unconstitutional under the First and Fourteenth Amendments. And, the Plaintiffs are entitled to a permanent injunction against all the Defendants to prevent the civil and criminal enforcement of § 211B.02's second sentence.

**Count 5: Minn. Stat. § 211B.02's second sentence violates the First Amendment right to expressive association.**

228. The Plaintiffs incorporate this complaint's previous paragraphs.

229. Expressive association exists wherever one person, with a second person's encouragement, backs the second person's candidacy for office or the second person's support of a candidate or ballot proposal. Indeed, one of the most important ways that people can engage in expressive association is to support a candidate for election to office or to work with others who are supporting a candidate or ballot proposal. Many individuals want their support or endorsement of a candidate or ballot proposal to be known so that the knowledge may influence how people vote. One way for the knowledge to become known is for others to spread awareness of the individual's support or endorsement.

230. But, under § 211B.02's second sentence, nobody is allowed to "state in written campaign material" that an individual supports or endorses a candidate or ballot proposal, unless the person first obtains a permission slip from the individual. The sentence makes no exception for truthful claims of support or endorsement. Indeed, the sentence does not even make a violation contingent on the individual whose support or endorsement is claimed objecting to the claim of support of endorsement. Consent is no defense unless the consent is both prior and written.

231. This bizarre prohibition thus burdens the expressive-association rights of both those who state their support or endorsement and those who spread awareness of others' support or endorsement.

232. The prohibition burdens individuals who want their support or endorsement to become known because it requires those individuals to provide a permission slip to a person before that person is allowed to spread awareness of the individual's support or endorsement through "written campaign material." This is not a trivial burden: a prominent individual's support or endorsement might be something that thousands of people want to announce in "written campaign material," i.e., any writing "disseminated" to influence election voting and not written by a journalist. Minn. Stat. § 211B.01, subd. 2. For all those people to be able to spread awareness of the prominent individual's support or endorsement, the prominent individual would need to give a permission slip to each of them. Many people wanting to spread awareness of an individual's support or endorsement might not know how to—or might be unable to—reach the individual to request permission. And an individual who wants knowledge of their support or endorsement to be disseminated has no way of knowing the identity of every person who might like to participate in the disseminating.

233. The prohibition burdens those who want to spread awareness of an individual's support or endorsement by requiring anybody wanting to spread awareness—except journalists—to get a permission slip from the individual before spreading awareness in writing.

234. The individual Plaintiffs plan to support or endorse candidates or ballot proposals in the future, and the individual Plaintiffs *want* people to be able to disseminate literature announcing their support or endorsement. The individual Plaintiffs want this dissemination

without the hassle of giving a permission slip to every possible disseminator—in fact, they don't want the hassle of providing a permission slip to anybody.

235. The Plaintiffs, both the individuals and the organizations, want to be able to spread awareness, through writing, of individuals' support or endorsement for candidates or ballot proposals. And the Plaintiffs want to be able to do this without the hassle of getting a permission slip from each individual whose support or endorsement the Plaintiffs want to state in writing.

236. Section 211B.02's second sentence is thus subject to strict scrutiny as a burden on the First Amendment expressive-association rights of the Plaintiffs and others.

237. The sentence is unconstitutional because it is not narrowly tailored to meet a compelling state interest.

238. The Plaintiffs are thus entitled to a declaration under 28 U.S.C. § 2201(a) that Minn. Stat. § 211B.02's second sentence is unconstitutional under the First and Fourteenth Amendments. And, the Plaintiffs are entitled to a permanent injunction against all the Defendants to prevent the civil and criminal enforcement of § 211B.02's second sentence.

**Count 6: Plaintiffs are entitled to injunctive relief due to the irreparable harm regarding the violation of constitutional protections.**

239. The Plaintiffs incorporate this complaint's previous paragraphs.

240. The Plaintiffs are entitled to preliminary and permanent injunctive relief prohibiting the Defendants from enforcing both of § 211B.02's sentences.

241. An injunction will terminate, and afford relief from, the threat, uncertainty, and insecurity, of § 211B.02.

242. Section 211B.02 provides for civil and criminal prosecution and penalties for political speech, creating a chilling effect on the Plaintiffs'—and others'—speech.

243. The Plaintiffs are likely to prevail on this action's merits.

244. The Plaintiffs will suffer irreparable harm if the Defendants are not enjoined from enforcing § 211B.02 because the Plaintiffs will lose unique opportunities to engage in political speech protected by the First Amendment.

245. The Defendants will not suffer any harm if they are prevented from enforcing § 211B.02.

246. Granting injunctive relief is in the public interest because doing so protects everybody's free-speech rights.

**Count 7: Constitutional claims under 42 U.S.C. § 1983 entitle the Plaintiffs to attorneys' fees and costs.**

247. The Plaintiffs incorporate this complaint's previous paragraphs.

248. The Defendants are responsible for enforcing Minn. Stat. § 211B.02.

249. Because enforcement or threatened enforcement of § 211B.02 violates, under color of state law, the Plaintiffs' First Amendment rights, the Plaintiffs are entitled to attorneys' fees and costs incurred in this suit. 42 U.S.C. §§ 1983, 1988.

**Prayer for Relief**

Therefore, the Plaintiffs respectfully ask that this Court:

1. Declare both sentences of Minn. Stat. § 211B.02 to be facially, and as applied to the facts of this case, unconstitutional under the First and Fourteenth Amendments;
2. Grant a preliminary and permanent injunction enjoining the Defendants from enforcing Minn. Stat. § 211B.02;

3. Award the Plaintiffs all costs, expenses, and expert witness fees allowed by law;
4. Award the Plaintiffs attorneys' fees and costs allowed under 42 U.S.C. § 1988;

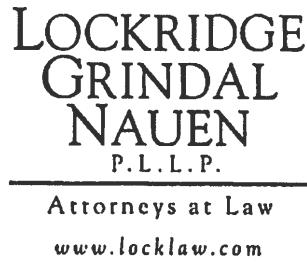
and

5. Award the Plaintiffs such other and further relief as this Court deems just.

Dated: July 24, 2019.

/s/Erick G. Kaardal  
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April 23, 2018

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### CEASE AND DESIST LETTER

Gentlemen:

I represent the Minnesota DFL Party. It has come to my attention that you have created and are using a logo consisting of the name "Minnesota RFL Republican Farmer Labor Caucus" encircled by a line drawing of the State of Minnesota (copy attached). This logo is confusingly similar to the longstanding logo of the Minnesota Democratic-Farmer-Labor Party (copy attached). Your use of the phrase "Republican Farmer Labor Caucus" is also confusingly similar to the longstanding name, "Democratic-Farmer-Labor Party".

Your use of the logo containing both of these DFL Party marks likely will improperly and illegally cause confusion among members of the public as to affiliation or association of your positions with the Minnesota DFL party, and/or will cause members of the public to believe that your positions have the support or approval of the Minnesota DFL Party when they do not. Moreover, your misuse of the DFL logo also harms the DFL in other ways.

We hereby demand that you immediately cease all use of the above-described "RFL" logo. If you continue such use despite this notification, we will consider all available legal means to protect the marks and goodwill of the Minnesota DFL Party.

MINNEAPOLIS, MN – WASHINGTON, DC – BISMARCK, ND  
From the Courtroom to the Capitol ®

527036.1

EXHIBIT 1

Representatives Rarick, Munson, Miller & Backer  
April 23, 2018  
Page 2

Please contact me should you have any questions. Thank you.

Very truly yours,  
LOCKRIDGE GRINDAL NAUEN P.L.L.P.  
Charles N. Nauen

Enclosures

c: Minnesota DFL Party  
David J. Zoll

OAH 68-0320-30147

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
ORDER**

Bonn Clayton,

Respondent.

The above-entitled matter came on for an evidentiary hearing at the Office of Administrative Hearings on February 7 and February 8, 2013, before a panel of three Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam P. Rykken. On February 15, 2013, the Parties filed post-hearing memoranda. On February 22, 2013, the Complainant filed a reply brief, and on February 26, 2013, the Respondent filed a reply brief.<sup>1</sup> The hearing record closed with the filing of the last submission on February 26, 2013.

David Asp, Attorney at Law, Lockridge Grindal Nauen, PLLP, appeared on behalf of Harry Niska, (Complainant).

Bonn Clayton (Respondent) appeared on his own behalf without assistance of counsel.

**STATEMENT OF THE ISSUE**

Did Respondent violate Minn. Stat. § 211B.02 by knowingly making statements that falsely implied that three Minnesota Supreme Court candidates had the endorsement or support of the Republican Party of Minnesota?

Did Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material that he knew was false or that he communicated with reckless disregard as to whether it was false?

The panel concludes that the Complainant has established that the Respondent violated both Minn. Stat. §§ 211B.02 and 211B.06 with respect to statements made in campaign material he prepared and disseminated.

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<sup>1</sup> The Respondent submitted his reply brief by email at 5:04 p.m. on Friday, February 22, 2013. The reply brief was received at the OAH by U.S. Mail on Tuesday, February 26, 2013.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

### FINDINGS OF FACT

1. Complainant Harry Niska is an attorney and is active in Republican Party of Minnesota (RPM) politics. Mr. Niska was a delegate to the RPM's May 2012 State Convention, as well as the Chair of the Convention's Platform Committee.<sup>2</sup>

2. Respondent Bonn Clayton is a long-time political activist and operative who has been deeply involved in RPM politics for over 50 years.<sup>3</sup> The Respondent is particularly interested in judicial elections and holds himself out as an authority on judicial candidates.<sup>4</sup>

3. Respondent is the Chair of the First Judicial District Republican Committee. The committee works to recruit judicial candidates to run for seats on the district court bench in the First Judicial District. Minnesota has 10 judicial districts. The First Judicial District is made up of Carver, Dakota, Goodhue, Le Sueur, McLeod, Scott and Sibley counties. The RPM permits interested members in each Judicial District to create and organize a committee to recruit judicial candidates.<sup>5</sup>

4. The RPM Constitution provides that if a Judicial District Committee is created, it is strictly auxiliary to the RPM and shall have no other powers except as provided by the RPM Constitution.<sup>6</sup> Judicial District Committees may search for judicial candidates and may call conventions of its Judicial District and endorse for a judicial office in that district.<sup>7</sup>

5. In December 2011, the RPM's State Central Committee approved a \$43,462 budget appropriation for the Party's Political department to assist the Judicial District Committees with expenditures, including \$462 for costs associated with starting up a new website called judgeourjudgesmn.com.<sup>8</sup>

6. The Judicial District Republican Chairs Committee is made up of the Chairs of the various Judicial District Committees. This committee was formed approximately eight years ago and it coordinates efforts to find judicial candidates for district and appellate courts. The Judicial District Republican Chairs Committee met about once a month and more frequently during the legislative session.<sup>9</sup> Former Chairs of the RPM

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<sup>2</sup> Testimony of Harry Niska; Ex. 2.

<sup>3</sup> Testimony of Bonn Clayton.

<sup>4</sup> Niska Test.; Clayton Test.

<sup>5</sup> Testimony of Ben Zierke; Ex. 24 (RPM Constitution at Art. 12, § 1).

<sup>6</sup> *Id.*

<sup>7</sup> Ex. 24 at Art. 12, § 1.

<sup>8</sup> Exs. C and G; Zierke Test.; Wersal Test; Clayton Test. (In the end, the money was never allocated given the RPM's financial difficulties.)

<sup>9</sup> Clayton Test.; Testimony of Ronald Niemala and Timothy Kinley.

Ron Carey and Tony Sutton, and other Party Officials have on occasion attended meetings of the Judicial District Republican Chairs Committee.<sup>10</sup>

7. The Respondent has been a member of the Judicial District Republican Chairs Committee since it was formed in about 2005.<sup>11</sup>

8. In addition to the Judicial District Committees and the Judicial District Chairs Committee, the RPM Constitution provides for the creation of various convention committees to assist with carrying out the work of RPM State Convention.<sup>12</sup> Once the State Convention is over, these committees typically disband. One of the State Convention committees is the "Judicial Election Committee." Its purpose is to review and encourage possible candidates for endorsement as well as to prepare a voters' guide on all judicial candidates and incumbent justices of the Minnesota Supreme Court and Court of Appeals.<sup>13</sup>

9. The RPM began endorsing judicial candidates for statewide and district races in 2004. In 2010, for example, the RPM endorsed three candidates for appellate court positions: Greg Wersal and Tim Tinglestad for the Minnesota Supreme Court, and Dan Griffith for the Minnesota Court of Appeals.<sup>14</sup> All three candidates lost.

10. The RPM Constitution provides that the Party shall consider at its state convention whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.<sup>15</sup> The Constitution states that the chair of the Judicial Election Committee will offer a report at the state convention regarding whether the Party should endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.<sup>16</sup> Following this report, the state convention delegates vote on whether endorsement should be considered. If the delegates vote in favor of endorsing candidates, then they vote on the endorsement of a person for the particular office of the Minnesota Supreme Court or Minnesota Court of Appeals.<sup>17</sup>

11. The RPM Constitution also states that within 14 days of the close of candidate filings for Minnesota Supreme Court and Minnesota Court of Appeals, the Judicial Election Committee will present its voters' guide for approval to the RPM Executive Committee for approval.<sup>18</sup>

12. Respondent was the Chair of the RPM's Judicial Elections Committee in 2008 and 2010. In 2012, Pat Shortridge, Chair of the RPM, removed Respondent as Chair of the Judicial Elections Committee. Respondent remained a member of the

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<sup>10</sup> Clayton Test.

<sup>11</sup> Clayton Test.

<sup>12</sup> Ex. 24 at Art. 6; Zierke Test.

<sup>13</sup> Ex. 24 at Art. 6B.

<sup>14</sup> Niska Test.; Ex. 3.

<sup>15</sup> Ex. 24 at Art. 5, § 3C.

<sup>16</sup> *Id.* at Art. 6C.

<sup>17</sup> Ex. 24 at Art. 5, § 3C.

<sup>18</sup> *Id.* at Art. 6D and 6E.

Judicial Elections Committee, however, and as a member he led the effort to recruit candidates for statewide judicial office.<sup>19</sup>

13. On or about April 24, 2012, Respondent sent an email to RPM Judicial District delegates requesting recommendations for statewide judicial candidates. Respondent indicated that the RPM State Convention Judicial Elections Committee would be making recommendations for endorsement at the May 2012 RPM State Convention and noted that the RPM needed more candidates for the Minnesota Supreme Court and Appellate Court races. The Respondent closed the email as follows: "Bonn Clayton, Republican Judicial District Chairs, RPM Judicial Election Committee."<sup>20</sup>

14. The three Minnesota Supreme Court seats that were up for election in 2012 were all held by jurists who had been appointed by former Republican Governor Tim Pawlenty: Chief Justice Lorie Gildea, Justice G. Barry Anderson, and Justice David Stras.

15. The RPM State Convention took place in St. Cloud on May 18 and 19, 2012.

16. During the convention, Respondent and the Convention's Judicial Elections Committee advocated for the RPM to endorse three Minnesota Supreme Court candidates at the convention. Specifically, they sought the RPM's endorsement for Tim Tinglestad, Dan Griffith, and Dean Barkley. After a spirited discussion, the delegates at the RPM State Convention ultimately voted not to endorse any statewide judicial candidates.<sup>21</sup> As a result, no judicial candidate had the endorsement of the RPM in the November 2012 general election.

17. According to the RPM Constitution, only endorsements "made at a convention that is representative of the entire electorate for the office" may receive the commitment of party resources, finances and volunteers.<sup>22</sup> The RPM Constitution provides that an endorsement for public office at a convention below the level of the one representative of the entire electorate for the office "shall be no more than an expression of the sentiment of the convention."<sup>23</sup>

18. Respondent was unhappy with the decision by the delegates not to endorse judicial candidates.

19. On September 27, 2012, the Respondent sent an email to First Judicial District delegates informing them that the First Judicial District Republican Committee held an endorsing convention and unanimously endorsed Brian Gravely for First Judicial

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<sup>19</sup> Zierke Test.

<sup>20</sup> Ex. 1; Clayton Test.

<sup>21</sup> Niska Test.; Ex. 2.

<sup>22</sup> Ex. 24 at Art. 5 § 3A(6).

<sup>23</sup> *Id.*

District Court judge, and Tim Tinglestad and Dan Griffin for the Minnesota Supreme Court.<sup>24</sup>

20. The RPM Judicial Chairs Committee and the First Judicial District Committee do not have the authority under the RPM Constitution to endorse candidates for statewide judicial office.<sup>25</sup>

21. In mid-October 2012, the Respondent and members of the Judicial District Republican Chairs Committee created a website called: [www.judgeourjudgesmn.com](http://www.judgeourjudgesmn.com) to provide information on judicial candidates that support Republican initiatives favored by the Judicial District Republican Chairs, such as removing the term "incumbent" from judicial ballots and requiring that district court judges be elected by the people they serve.<sup>26</sup>

22. On October 18, 2012, the Respondent sent an email with the subject heading, "Which Judges should I vote for?", to a list of RPM Judicial District Delegates and Alternates. The Respondent obtained the list, which included more than 7,000 people, from local units of the RPM known as "Basic Political Operating Units" or BPOUs and from the Party Chairs of Congressional Districts (CDs).<sup>27</sup> In the email, the Respondent stated that "Party leaders" had put together a Voters' Guide in response to many calls from voters wondering who they should vote for in the judicial races.<sup>28</sup> Respondent encouraged recipients of the email to go to the [judgeourjudgesmn](http://judgeourjudgesmn) website and view the Voters' Guide. Respondent also requested that recipients of the email send the website link to "all of your BPOU precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates."<sup>29</sup> The Respondent signed the email: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."<sup>30</sup>

23. Recipients of Respondent's October 18<sup>th</sup> email and others who viewed the [judgeourjudgesmn](http://judgeourjudgesmn) website on or about October 18, 2012, saw centered at the top of the website's home page in approximately 11-point font the heading: "Republican Party of Minnesota – Judicial District Chairs Committee." Centered underneath that heading, in large 18-point font, was the caption: "2012 Minnesota Judicial Voters' Guide."<sup>31</sup> The text that followed was written in letter format and was authored by the Respondent, who identified himself at the end of the text as: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."<sup>32</sup> To the right of the text was a list of three Minnesota Supreme Court candidates and four district court candidates with links to information about each candidate.<sup>33</sup>

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<sup>24</sup> Ex. 19

<sup>25</sup> Zierke Test.

<sup>26</sup> Ex. 5; Testimony of Timothy Kinley.

<sup>27</sup> Clayton Test.; Niska Test.

<sup>28</sup> Ex. 4.

<sup>29</sup> Ex. 4.

<sup>30</sup> *Id.*

<sup>31</sup> Ex. 5.

<sup>32</sup> Ex. 5.

<sup>33</sup> Ex. 5.

24. The text of the homepage of the judgeourjudgesmn 2012 Minnesota Judicial Voters' Guide was written by Respondent and advocated for the election of the seven judicial candidates listed. Viewers were informed that the identified candidates were "strongly recommended" by the Judicial District Republican Chairs Committee and they were encouraged to vote for the candidates and to tell others to do the same. The Respondent included a disclaimer in 10-point font that ran across the very bottom of the web page and stated: "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs."<sup>34</sup>

25. Viewers of the website's homepage who selected the link leading to more information on candidate Tim Tinglestad were directed to a page dedicated to Mr. Tinglestad's candidacy.<sup>35</sup>

26. Like the judgeourjudgesmn home page, the Tinglestad page also had the heading "Republican Party of Minnesota – Judicial District Chairs Committee" centered at the top. Underneath that heading was a photo of Mr. Tinglestad followed by three paragraphs of text highlighting the difference between him and his opponent, Minnesota Supreme Court Justice David Stras. Mr. Tinglestad drafted the text at the request of the Respondent, who asked Mr. Tinglestad to contrast himself with Justice Stras. Mr. Tinglestad submitted the text and his photo to the Respondent for publication on the website. In the text, Mr. Tinglestad, who serves as a Magistrate for the Ninth Judicial District, emphasizes his belief in a "constitutional right to meaningful judicial elections" and includes the following statement:

David Stras supports the plan to replace our constitutional right to meaningful judicial elections with an impeachment process called Merit Selection with Retention Elections.<sup>36</sup>

27. Mr. Tinglestad has never spoken to Justice Stras and was unaware of any statements made by him regarding judicial elections that were published in candidate questionnaires or elsewhere. Mr. Tinglestad researched articles online and generally got the impression that Justice Stras was in favor of retention elections (recommended by the Quie Commission) over the current judicial election process.<sup>37</sup>

28. Mr. Tinglestad is unable to recall any specific article that he read that lead him to conclude Justice Stras favors replacing the current judicial election process with retention elections.<sup>38</sup>

29. A disclaimer included at the bottom of the Tinglestad web page stated: "Prepared and paid for by Republican Party of Minnesota – Judicial District Republican Chairs. Bonn Clayton – busware@aol.com."<sup>39</sup>

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<sup>34</sup> Ex. 5.

<sup>35</sup> Ex. 6.

<sup>36</sup> *Id.*

<sup>37</sup> Testimony of Timothy Tinglestad.

<sup>38</sup> Tinglestad Test.

<sup>39</sup> *Id.*

30. Mr. Tinglestad did not draft or include the disclaimer in the material he submitted to the Respondent for publication on the website.<sup>40</sup>

31. Greg Wersal, an attorney and advisor to the Judicial District Republican Chairs Committee, believes that Justice Stras favors the retention election system proposed by the Quie Commission. Mr. Wersal attended a seminar at the University of Minnesota in April 2011 sponsored by the Federalist Society at which Justice Stras was the featured speaker. Mr. Wersal spoke with Justice Stras at a reception following his presentation. Based on this conversation, Mr. Wersal formed the opinion that Justice Stras supports the renewal of judicial terms through retention elections over the current judicial election process. Mr. Wersal may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.<sup>41</sup>

32. Ben Zierke, Executive Director of the RPM, received a number of telephone calls from people who had visited the judgeourjudgesmn website and/or had received Respondent's October 18<sup>th</sup> email and were confused about whether the RPM had endorsed judicial candidates.<sup>42</sup>

33. To address the confusion caused by the judgeourjudgesmn website and Respondent's email, the RPM decided to issue its own email to RPM activists clarifying that it had not endorsed any statewide judicial candidates in 2012.<sup>43</sup>

34. At the end of the day on October 19, 2012, Pat Shortridge and David Asp, Chair of the RPM Judicial Committee, sent an email to the Party's master list of RPM delegates clarifying that the RPM had not endorsed any statewide judicial candidates in 2012 in conformance with the express decision of the delegates at the state RPM convention. Mr. Shortridge and Mr. Asp referenced the recent dissemination of "misleading" emails and an unofficial "voter's guide" that imply the RPM is supporting three judicial candidates. Mr. Shortridge and Mr. Asp warned recipients to be wary of the information contained in the emails and unauthorized voter's guide as they include misleading statements and improperly imply that the RPM endorses particular candidates. In response to this misinformation, Mr. Shortridge and Mr. Asp announced that the RPM had created an "official judicial election guide" and included a link to it for voters to educate themselves generally about the judicial candidates. Mr. Shortridge and Mr. Asp closed the email by requesting recipients forward the official RPM voter guide to all interested Minnesotans.<sup>44</sup>

35. For approximately two days after October 25, 2012, the judgeourjudgesmn website was taken down and was not accessible on the internet. The site was back up on or about October 27, 2012. In an email announcing that the website was back up, the Respondent referred to himself as: "Bonn Clayton, Convener, MN Judicial District Republican Chairs" eliminating the reference to "Republican Party of Minnesota."

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<sup>40</sup> Tinglestad Test.

<sup>41</sup> Testimony of Greg Wersal.

<sup>42</sup> Zierke Test.

<sup>43</sup> Zierke Test.; Ex. 8.

<sup>44</sup> Ex. 8. See also, Ex. 9.

However, as of October 27, 2012, the disclaimer stating that the site was prepared and paid for by the “Republican Party of Minnesota – Judicial District Republican Chairs” remained at the bottom of the site’s home page.<sup>45</sup>

36. In a newspaper questionnaire directed at Minnesota Supreme Court candidates and posted online on October 26, 2012,<sup>46</sup> Justice David Stras stated that he took “no position” on the proposed judicial retention election system. Justice Stras stated that “the decision about how to select judges is committed to the people and the legislature, not the judicial branch.” Justice Stras noted that the constitution’s separation of powers provided a reason for judges and judicial candidates to decline to comment about matters “beyond the scope of the job.”<sup>47</sup> Justice Stras made similar comments during a radio news program interview sometime in the weeks prior to the election.<sup>48</sup>

37. In late October and early November 2012, the Respondent sent additional emails to RPM Judicial District and Convention delegates encouraging them to vote for the judicial candidates identified on the judgeourjudgesmn website.<sup>49</sup> In the emails, the Respondent used the name “Republican Party of Minnesota” or the initials “RPM.”<sup>50</sup> The Respondent also used terms like “delegates” and “BPOU,” which have specific meanings to activists and members of the RPM and implied that the information was sanctioned by the RPM.<sup>51</sup>

38. On or about October 29, 2012, Richard Morgan, counsel for the RPM, sent the Respondent an email regarding the “2012 Minnesota Judicial Voters’ Guide” on the judgeourjudgesmn website. Mr. Morgan reminded the Respondent that the RPM had not endorsed any judicial candidate in the November 2012 general election. Mr. Morgan expressed concern that use of the RPM name on the website would lead to confusion regarding the judicial endorsements. As a result, Mr. Morgan directed the Respondent to immediately remove the RPM disclaimer from the website and to advise all recipients of emails connected with the 2012 Minnesota Judicial Voters’ Guide that the use of the RPM disclaimer was a mistake. Mr. Morgan warned the Respondent that his failure to do so might lead to a complaint being filed with the Office of Administrative Hearings.<sup>52</sup>

39. On October 30, 2012, the Respondent sent an email to Mr. Morgan informing him that the Judicial District Republican Chairs Committee had changed the wording of the disclaimer on the judgeourjudgesmn website. The revised disclaimer stated: “Prepared and paid for by the First Judicial District Republican Committee of the

<sup>45</sup> Exs. 5 and 10; Niska Test; Zierke Test.

<sup>46</sup> Ex. 7 (posted on the *Mille Lacs Messenger* website at [www.messengermedia.com](http://www.messengermedia.com)).

<sup>47</sup> Ex. 7 at 13.

<sup>48</sup> Niska Test.

<sup>49</sup> Exs. 10, 14 and 15.

<sup>50</sup> Exs. 14 and 15.

<sup>51</sup> *Id.*; Niska Test.

<sup>52</sup> Ex. 11.

Republican Party of Minnesota.”<sup>53</sup> The Respondent also noted in his email to Mr. Morgan that the Judicial District Republican Chairs Committee has existed for “more than 10 years,” meets regularly, sometimes at the RPM headquarters, and has had budget items approved by the RPM.<sup>54</sup>

40. In an email to the Respondent sent on October 31, 2012, Mr. Morgan informed the Respondent that the new disclaimer had been reviewed and was found to still be unacceptable. Mr. Morgan stated that the RPM would file a complaint.<sup>55</sup>

41. On November 2, 2012, the Respondent issued an email to the RPM “Judicial Delegates” on behalf of the Chairs of the “Minnesota Judicial District Republican Committees” encouraging them to vote for Dean Barkley over Justice Barry Anderson. The Respondent stated that the Minnesota Judicial District Republican Committees decided to recommend Dean Barkley because Justice Barry Anderson:

voted against Pawlenty on unallotment, he voted against Sen. Scott Newman when Newman challenged the validity of a Ramsey County judge’s [sic] establishing a State Government Budget during the government Shutdown in 2011, and he has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!). He has generally sided with the liberal majority on the Court.<sup>56</sup>

42. The Respondent drafted the November 2, 2012, email himself. He did not research the three cases he referenced because he felt he did not have the time to verify the accuracy of the statements so close to the election and he believed each of the statements was accurate.<sup>57</sup>

43. The Respondent indicated that he believed Justice Barry Anderson voted against Governor Pawlenty on the unallotment case based generally on something he read in the *Star Tribune* newspaper. Likewise, he believed Justice Barry Anderson voted against Senator Scott Newman and others based on something he read in the *Star Tribune* newspaper. The Respondent did not identify on what he based his belief that Justice Barry Anderson supported “unconstitutional campaign restrictions.”<sup>58</sup>

44. Respondent’s statement in the November 2<sup>nd</sup> email regarding the “unallotment case” refers to *Brayton v. Pawlenty*,<sup>59</sup> in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty’s use of unallotment as

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<sup>53</sup> Clayton Test.

<sup>54</sup> Ex. D.

<sup>55</sup> Ex. E.

<sup>56</sup> Ex. 15.

<sup>57</sup> Clayton Test.

<sup>58</sup> Clayton Test.

<sup>59</sup> 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

a violation of the separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.<sup>60</sup>

45. Respondent's statement in the November 2<sup>nd</sup> email regarding Senator Scott Newman refers to *Limmer et al. v. Swanson*,<sup>61</sup> a case brought by four Republican Minnesota Senators and two Republican members of the Minnesota House challenging a Ramsey County District Court Judge's authority to carry out budgetary functions and approve spending on behalf of the State during the state government shutdown in 2011. The Minnesota Supreme Court ultimately dismissed the case as moot once the legislature and governor resolved the government shutdown and appropriation bills for all state agencies were passed and signed into law. Justice Barry Anderson joined the six-justice majority in dismissing the lawsuit as moot.<sup>62</sup>

46. The Respondent's statement in the November 2<sup>nd</sup> email regarding campaign restrictions that the Republican Party challenged in the United States Supreme Court refers to *Republican Party of Minnesota v. White*.<sup>63</sup> This case was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court.<sup>64</sup>

47. On November 4, 2012, Greg Wersal sent an email to Richard Morgan in response to his October 29<sup>th</sup> request that Respondent remove the RPM disclaimer from the judgeourjudgesmn website and notify email recipients that use of the RPM disclaimer was a mistake. Mr. Wersal stated that "Minn. Stat. § 211B.02 does permit an organization within a major political party to issue a statement of support for a candidate."<sup>65</sup> Mr. Wersal noted that the term "organization" is not defined in Chapter 211B and he pointed out to Mr. Morgan that the Judicial District Chairs Committee has existed for 10 years and meets regularly. Mr. Wersal closed his correspondence by suggesting that the parties resolve their issues rather than "proceed down the road to endless litigation."<sup>66</sup>

48. Justices Lorie Gildea, Barry Anderson and David Stras were all re-elected on November 6, 2012.

49. The campaign complaint in this matter was filed with the Office of Administrative Hearings on November 7, 2012.

50. Mr. Wersal and members of the Judicial District Republican Chairs Committee met shortly after the filing of this complaint. Two members continued to express the erroneous belief that Justice Barry Anderson voted against Governor Pawlenty in the unallotment case.<sup>67</sup> Mr. Wersal informed the Respondent and the

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<sup>60</sup> *Id.*

<sup>61</sup> A11-1222 (Minn. Nov. 30, 2011); Ex. 17.

<sup>62</sup> *Id.*

<sup>63</sup> 536 U.S. 765 (2002); Ex. 18.

<sup>64</sup> Ex. 18.

<sup>65</sup> Ex. F.

<sup>66</sup> Ex. F; Wersal Test.

<sup>67</sup> Wersal Test.

others at the meeting that Justice Barry Anderson did not vote against Governor Pawlenty in that case.<sup>68</sup>

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

## CONCLUSIONS

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minnesota Statutes § 211B.02 provides:

### **211B.02 False Claim of Support.**

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

3. The burden of proving the allegations in the Complaint is on the Complainant.

4. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.<sup>69</sup>

5. Minnesota Statutes Chapter 211B does not define the term "party unit." The term is defined in Chapter 10A, which governs the Campaign Finance and Public Disclosure Board, to mean "the state committee or the party organization within a house or the legislature; congressional district, county, legislative district, municipality or precinct."<sup>70</sup>

6. The Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by knowingly making a false claim implying that the RPM, a major political party, supported or endorsed three candidates for the Minnesota Supreme Court in the November 2002 general election.

7. Minnesota Statutes § 211B.06, subd. 1, provides in part:

A person is guilty of a misdemeanor who intentionally participates in the preparation, [or] dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ...

<sup>68</sup> *Id.*

<sup>69</sup> Minn. Stat. § 211B.32, subd. 4.

<sup>70</sup> Minn. Stat. § 10A.01, subd. 30.

that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

8. The standard of proof of a violation of Minn. Stat. § 211B.06 is clear and convincing evidence.<sup>71</sup>

9. Minn. Stat. § 211B.01, subd. 2, defines "campaign material" to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."

10. The Respondent's emails at issue in this matter and the judgeourjudgesmn website are campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

11. The Complaint alleged that the Respondent knowingly prepared and/or disseminated four factually false statements, or communicated these statements with reckless disregard as to whether they were false in violation of Minn. Stat. § 211B.06.

12. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the first statement identified in the Complaint: "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections."

13. The Complainant has established by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the second statement identified in the Complaint: "[Justice Barry Anderson] voted against Pawlenty on unallowment." The Complainant has shown that the statement is factually false and that Respondent prepared and disseminated the statement with reckless disregard as to whether it was false.

14. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the third statement identified in the Complaint: "[Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's [sic] establishing a State Government Budget during the government shutdown in 2011."

15. The Complainant has also failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the fourth statement identified in the Complaint: "[Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates ..."

16. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

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<sup>71</sup> Minn. Stat. § 211B.32, subd. 4.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

**ORDER**

**IT IS ORDERED:**

That having been found to have violated Minn. Stat. §§ 211B.02 and 211B.06, Respondent Bonn Clayton shall pay a civil penalty in the amount of \$1,200 by June 15, 2013.<sup>72</sup>

Dated: March 12, 2013

*Barbara L. Nelson Jr.*  
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JEANNE M. COCHRAN  
Presiding Administrative Law Judge

*James E. Lafferty*  
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JAMES E. LAFAYE  
Administrative Law Judge

*Miriam P. Rykken*  
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MIRIAM P. RYKKEN  
Administrative Law Judge

**NOTICE**

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

**MEMORANDUM**

The Complaint alleges that the Respondent, a long-time active member of the RPM, violated Minnesota Statutes §§ 211B.02 and 211B.06 in preparing and disseminating campaign material advocating for the election of three candidates for the Minnesota Supreme Court in the November 2012 general election.

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<sup>72</sup> The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul, MN 55164-0620.

### False Implication of Endorsement or Support – 211B.02

The Respondent is an experienced and active member of the Republican Party of Minnesota. He is the Chair of the First Judicial District Republican Committee, and was a member of the RPM's 2012 Judicial Elections Committee. The Respondent attended the RPM State Convention and was aware that the delegates voted not to endorse any statewide judicial candidates in the 2012 general election. Despite the Party's decision not to endorse statewide judicial candidates, the Respondent prepared and disseminated emails and published material on the judgeourjudgesmn website that advocated for the election of three Minnesota Supreme Court candidates and included the name "Republican Party of Minnesota" or initials "RPM." In particular, the website's heading stated: "Republican Party of Minnesota – Judicial District Chairs Committee" and a disclaimer at the bottom read: "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs."

The Complaint alleges that by preparing and publishing the emails and website using the RPM name and initials, the Respondent knowingly implied that the judicial candidates had the support or endorsement of the Republican Party of Minnesota in violation of Minn. Stat. § 211B.02.

The Respondent argues that he did not knowingly violate Minn. Stat. § 211B.02. First, he argues that his emails and the judgeourjudgesmn website were intended for RPM delegates and alternates and not for the "world at large." The Respondent asserts that the Party delegates and alternates are sophisticated Party members who were already aware that the RPM had not endorsed statewide judicial candidates and would not have read the material as implying RPM endorsement or support. The Respondent also points out that he never used the word "endorsed" in his material and instead used only the phrase "strongly recommended." In addition, the Respondent maintains that he modified references to the "RPM" by adding the title of the Judicial District Republican Chairs Committee to avoid an implication of official RPM endorsement. Finally, the Respondent asserts that the Judicial District Republican Chairs Committee is a "party unit" of the RPM and, as such, its communication of support for the judicial candidates did not violate § 211B.02.

Minn. Stat. § 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit. In *Schmitt v. McLaughlin*,<sup>73</sup> the Minnesota Supreme Court held that an unendorsed candidate's use of the initials "DFL" violated the statute because it implied to the average voter that the candidate had the endorsement or at the very least the support of the DFL Party.

In *Matter of Ryan*,<sup>74</sup> a case with similarities to this one, a non-endorsed candidate for County Commissioner distributed campaign brochures and lawn signs with the initials "DFL" and the words "LABOR ENDORSED" in large capital block letters.

<sup>73</sup> 275 N.W.2d 587.

<sup>74</sup> 303 N.W.2d 462 (Minn. 1981).

Between "DFL" and "LABOR ENDORSED," in small lettering, was the phrase "47 'District 5' Secretary" or "47 'Secretary Sen. Dist.," which referred to a DFL party office the candidate held in the 47<sup>th</sup> Senate District. The candidate argued that the use of his party office on the campaign material was intended to modify "DFL" as an indication of party affiliation and not endorsement. The candidate insisted that he did not intend to violate the statute and that he made a conscious attempt to comply with the law.<sup>75</sup>

The Court rejected the candidate's argument that his party office modified "DFL" and found that the use of the initials "DFL" without the modifying language authorized in *Schmitt* implied party endorsement. However, in determining whether the candidate's false implication of party support was made knowingly, the Court declined to interpret "knowingly" to mean "deliberate." Instead, the Court held that the candidate may be said to have "knowingly" violated the statute "if he knew that his literature falsely claimed or implied that he had party support or endorsement."<sup>76</sup> In order to make this determination, the Court explained that the candidate's testimony had to be examined together with the circumstances surrounding the preparation of the campaign material. The Court noted that the candidate was an experienced party regular who had run in a number of elections and had acknowledged familiarity with both the statute and the *Schmitt* case. Based on all of this, the Court held that by not using the precise modifying language authorized by the *Schmitt* court, the candidate consciously took the risk that his interpretation of the law was not correct.<sup>77</sup>

Finally, in *Daugherty v. Hilary*,<sup>78</sup> a candidate for alderman for the Third Ward of Minneapolis distributed "Official Sample Ballots," which the Court found falsely implied that the candidate was endorsed by the DFL party. The Court concluded that when taken as a whole, the candidate's sample ballot was a thinly disguised attempt to directly imply that the document was the DFL sample ballot, thus falsely implying the candidate was the DFL endorsed candidate. The Court concluded that the candidate "consciously undertook to derive as much benefit as possible from the voter's familiarity with party sample ballots short of an outright claim of endorsement."<sup>79</sup> Thus, the Court found the candidate's violation was committed knowingly.

The Panel concludes that by using the name "Republican Party of Minnesota" and "RPM" in the emails and on the website, the Respondent falsely implied to average voters that three Minnesota Supreme Court candidates had the endorsement or, at the very least, the support of the RPM – a major political party. The Panel rejects the Respondent's argument that because the email was intended for Party regulars, a false implication should not be found. There is no exception to the prohibition against false implications of support made only to party members. Moreover, the record established that the emails did cause confusion among Party members about whether the RPM had changed its position since the state convention and was now endorsing these candidates. In addition, the Respondent encouraged the 7,000 email recipients to

<sup>75</sup> 303 N.W.2d at 467.

<sup>76</sup> 303 N.W.2d at 467.

<sup>77</sup> 303 N.W.2d at 468. (Minn. Stat. § 210A.02 is the predecessor to Minn. Stat. § 211B.02.)

<sup>78</sup> 344 N.W.2d 826 (Minn. 1984).

<sup>79</sup> 344 N.W. 2d at 831.

"send the link [to the website's voters' guide] to anybody else you can think of!" Given that directive, the Respondent cannot maintain that the email was only intended for a select audience and not for "the world at large."

The Panel also rejects the Respondent's claim that he did not violate Minn. Stat. § 211B.02 because the Judicial District Republican Chairs Committee, as a "party unit," could endorse statewide judicial candidates. Regardless of whether the Judicial District Republican Chairs Committee is a "party unit" within the meaning of 211B.02, Respondent implied that the RPM itself had endorsed or supported the candidates when he used the RPM's name and initials in the campaign material. The emails and website went beyond simply communicating the Committee's support and instead falsely implied the candidates had the support of the Republican Party of Minnesota.

The Panel finds further that Respondent knowingly violated the statute. The Respondent is an experienced Party regular who was well aware of the RPM's official position regarding endorsing statewide judicial candidates. Despite the delegates decision at the State Convention, the Respondent designed the website's "Judicial Voters' Guide" and used the Party's name and terms such as BPOU to imply that the material was authorized by the RPM and that the RPM supported the three identified judicial candidates.

The Respondent also raised the argument that the Complainant, Mr. Niska, lacked standing to bring this Complaint as this is a matter between the RPM and the Respondent. The Respondent asserts that allowing third parties to file complaints "on behalf of others" is an abuse of process that will chill free speech. The Fair Campaign Practices Act does not limit who may file a complaint.<sup>80</sup> However, Minnesota election law specifically provides that any eligible voter may contest the election of a person for whom they had the right to vote.<sup>81</sup> This suggests that the Legislature favors a broad interpretation of standing. And it seems logical that each eligible voter may be injured by false claims of endorsement or other false statements in campaign material. The Complainant is an eligible voter and a RPM member. As such, he may properly complain of violations of Minn. Stat. Ch. 211B.

Finally, as a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may properly consider, however, whether a statute is unconstitutional as applied to the particular facts of a case.<sup>82</sup> With respect to the Respondent's general arguments that Minn. Stat. § 211B.02 is unconstitutional, the Panel notes that in *Schmitt v. McLaughlin*,<sup>83</sup> the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 210A.02 (the predecessor to § 211B.02) concluding that

<sup>80</sup> See, Minn. Stat. § 211B.32.

<sup>81</sup> Minn. Stat. § 209.02, subd. 1.

<sup>82</sup> The power to declare a law unconstitutional in all settings is vested with the judicial branch of state government. See, *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. App. 1993). See also, G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).

<sup>83</sup> 275 N.W.2d at 590-591.

since the statute regulates only false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.<sup>84</sup> Whether that decision remains good law in light of the U.S. Supreme Court's recent ruling in *United States v. Alvarez*,<sup>85</sup> is not for this Panel to decide.

### False Campaign Material – 211B.06

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct. In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>86</sup>

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>87</sup> A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.<sup>88</sup>

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.<sup>89</sup> Based upon this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that he "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.<sup>90</sup> A statement may have been made with

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<sup>84</sup> *Id.* discussing Minn. Stat. § 210A.02 (predecessor to § 211B.02).

<sup>85</sup> 567 U.S. \_\_\_\_ (June 28, 2012) (Supreme Court overturned law making it a crime to falsely claim to have earned a military decoration as an unconstitutional infringement on First Amendment right to free speech. Court held that First Amendment requires there be a direct causal link between the restriction imposed and the injury to be prevented.)

<sup>86</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

<sup>87</sup> *Jadwin*, 390 N.W.2d at 441.

<sup>88</sup> *Id.*

<sup>89</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

<sup>90</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

actual malice if it is fabricated or is so inherently improbable that only a reckless man would put it in circulation.<sup>91</sup>

To be found to have violated section 211B.06, therefore, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false. As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. With respect to the second element of the statute – namely, Respondent's awareness surrounding the claims he made – the test is subjective: The Complainant must show that the Respondent "entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.<sup>92</sup> Otherwise, his claim for relief fails.

The Complaint identified four statements that were either prepared or disseminated by the Respondent that the Complainant contends are factually false. The Complainant maintains that the Respondent knew these statements were false or communicated them with reckless disregard as to their probable falsity.

**A. First Statement: "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections"**

The Complaint argues that the above statement which appeared on the judgeourjudgesmn website page devoted to Mr. Tinglestad's candidacy is false. The statement was drafted by Mr. Tinglestad and Respondent participated in publishing or disseminating it on the website. The Complainant contends the statement is false because Justice Stras has consistently declined to take any position on the proposed judicial election retention system, citing separation of powers principles. According to the Complainant, there is no evidence to support the claim that Justice Stras supports retention elections.

Mr. Tinglestad testified that he came to the conclusion that Justice Stras favors retention elections after conducting research on-line. Based on materials he read on-line, Mr. Tinglestad got the general impression that Justice Stras favors replacing the current judicial election system with the proposed merit selection and retention elections. Mr. Wersal, an advisor to the Judicial District Republican Chairs Committee, also formed the opinion that Justice Stras supports retention elections after talking to Justice Stras following a legal seminar at which Justice Stras was a featured speaker. Mr. Wersal indicated that he may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.

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<sup>91</sup> *St. Amant*, 390 U.S. at 732.

<sup>92</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

The Respondent asserts that he accepted Mr. Tinglestad's text for the website and assumed the statement was true. He also argues that the exception for publishers provided at Minn. Stat. § 211B.06, subd. 2 should apply in this case because he relied on the good character of Mr. Tinglestad and simply published what he provided.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that the statement is false. It is not enough for the Complainant to assert that there is no evidence to support the claim. The Complainant has the burden of coming forward with sufficient evidence to demonstrate that the statement is factually false. The fact that Justice Stras consistently took no position on the issue of judicial elections during the campaign is insufficient to establish that he did not support retention elections as claimed by Mr. Tinglestad. In addition, the Complainant has failed to establish that the Respondent disseminated the statement "with a high degree of awareness" of the statement's probable falsity. This allegation is dismissed.

The Panel notes, however, that the exception to Minn. Stat. 211B.06 provided for publishers would not apply in this case. The exception applies only if the person's *sole* act was the printing, manufacturing or dissemination of the false material. The exception would apply, for example, to a printing company or mailing center whose regular business is to print and produce materials for customers. The Respondent's role in creating, gathering and disseminating the information on the website went beyond the parameters of the exception contained in Minn. Stat. § 211B.06, subd. 2.

**B. Second Statement: "[Justice Barry Anderson] voted against Pawlenty on unallotment"**

The Complaint alleges that Respondent's statement in a November 2<sup>nd</sup> email to RPM Judicial Delegates that Justice Barry Anderson "voted against" Governor Pawlenty on unallotment is false and that Respondent communicated the statement with reckless disregard as to whether it was false. The statement refers to the case of *Brayton v. Pawlenty*,<sup>93</sup> in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty's use of unallotment as a violation of separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.<sup>94</sup> The *Brayton* decision was issued in May 2010, and the Complainant argues that the Respondent could have easily determined that his statement was false with very brief research. Instead, the Complainant argues, the Respondent willfully ignored the truth and disseminated a false claim about Justice Anderson's vote in *Brayton*.

The Respondent asserts that he thought Justice Barry Anderson did vote against Governor Pawlenty in the *Brayton* case based on "something" he read possibly in the *Star Tribune* newspaper. Other members of the Judicial District Republican Chairs Committee also thought that Justice Barry Anderson had voted against Governor Pawlenty. Because he believed the statement was true and because the election was

<sup>93</sup> 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

<sup>94</sup> *Id.*

only a few days away, the Respondent felt he did not have the time to verify his claims made in his November 2<sup>nd</sup> email. The Respondent explained that the remaining days before an election are a chaotic time and that decisions must be made in "the fog of war."

The statement is factually false. The issue before the Panel is whether the Respondent communicated it with reckless disregard as to whether it is false. As the U.S. Supreme Court has noted, there is not one precise definition of "reckless disregard." Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.<sup>95</sup> A statement may have been made with actual malice if it

is fabricated by the defendant, is the product of his imagination, . . . is based wholly on an unverified anonymous telephone call [or if] the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.<sup>96</sup>

In determining whether a respondent had serious doubts about the truth of his statement, the panel must assess the information available when the statement was made, including the identities of the sources and what those sources said. Evidence that there were no sources, that the sources were unreliable or uninformed, or that the information provided by the source was misrepresented may prove the requisite mental state.<sup>97</sup>

Here, the Respondent claims that he thought his statement regarding how Justice Barry Anderson voted in the unallowment case was true based on a vague recollection he had of something he read in the *Star Tribune*. The Panel finds Respondent's explanation is not plausible. The vagueness of his recollection on this point when he otherwise provided very detailed testimony on past events, demonstrates that the Respondent's claim that he had no doubt as to the statement's accuracy is not credible. The Respondent testified that he had no clear memory of the article on which his statement is based. Given this, the Panel concludes that the Respondent had serious doubts as to the content of the article and the accuracy of his statement. Moreover, as this Office has held in *Martin v. Republican Party of Minnesota*<sup>98</sup> and *Olseen v. Barrett*,<sup>99</sup> the Panel finds that by citing to the *Brayton* decision, the Respondent is charged with knowing it. The Respondent could have discovered that

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<sup>95</sup> *St. Amant*, 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9<sup>th</sup> Cir. 1997) ("As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.").

<sup>96</sup> *St. Amant*, 390 U.S. at 732.

<sup>97</sup> See *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 815-16 (Minn. 2006).

<sup>98</sup> OAH Case No. 7-0320-30106 (Dec. 7, 2012).

<sup>99</sup> OAH Case No. 60-0320-30172 (Feb. 5, 2013).

the statement was untrue by doing minimal research. The *Brayton* decision was issued in 2010, two years before Respondent's statement. It was a widely publicized decision. Instead of verifying how Justice Barry Anderson voted in the case, the Respondent made and disseminated the claim without regard to whether it was false or not. For the above reasons, the Panel finds that the Respondent violated Minn. Stat. § 211B.06.

**C. Third Statement: [Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's establishing a State Government Budget during the government shutdown in 2011."**

The Complainant contends that this statement is false because Justice Barry Anderson did not "vote" against Senator Newman's suit in *Limmer et al v. Swanson*, but instead voted with the majority that the suit was rendered moot by the subsequent budget agreement.

The Respondent asserts that the statement is not false but rather a fair interpretation of the ultimate outcome of the case. By having their suit dismissed, the legislators, including Senator Newman, lost. The Respondent argues that, as a non-lawyer, he may not have gotten the language precisely correct but he accurately conveyed how the average person would interpret the Court's decision. In addition, the Respondent maintains that there is no evidence that he entertained serious doubts when he published the statement.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that the statement is factually false. The statement reflects the interpretation that a vote to dismiss Senator Newman's lawsuit as moot, was a vote against Senator Newman. The statement may not be literally true in every detail, but the gist and sting is true.<sup>100</sup> In addition, the Complainant has failed to show that the Respondent acted with a "high degree of awareness" that the statement was probably false. The Minnesota Supreme Court has noted that "even a 'highly slanted perspective' . . . is not enough by itself to demonstrate actual malice."<sup>101</sup> This allegation is dismissed.

**D. Fourth Statement: [Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!)."**

The Complainant argues that this statement is false because the U.S. Supreme Court case referenced, *Republican Party of Minnesota v. White*, was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court. The *White* case struck down certain rules imposed on judicial candidates by the State's Code of Judicial Conduct.

<sup>100</sup> *Jadwin*, 390 N.W.2d at 441.

<sup>101</sup> *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003).

The Respondent argues that the fact that Justice Barry Anderson was not a member of the Minnesota Supreme Court when the *White* decision was issued, is not dispositive of whether the statement is false. The Respondent points out that no evidence was presented as to whether Justice Anderson supported the ethics rules at issue in the *White* case prior to joining the bench. Without some evidence regarding Justice Anderson's position on the ethics rules, the Respondent maintains that the statement cannot be found to be factually false. Respondent also contends that he thought the statement was true when he disseminated it, and that he did not entertain serious doubts as to its truth.

The Panel concludes that the statement is too vague to form the basis of a Section 211B.06 claim. It is unclear what precisely the Respondent is referring to when he states that Justice Anderson has "consistently supported unconstitutional campaign restrictions." The Respondent did not state that Justice Anderson voted in a certain manner, which is a claim capable of being proven true or false. He states that Justice Anderson "consistently supported" campaign restrictions that the RPM challenged. While the U.S. Supreme Court did rule in the *White* case that the restrictions placed on judicial candidates regarding stating their views on legal or political issues violated candidates' First Amendment rights, the case was remanded for further consideration and the litigation did not end until 2006. It may be that the Respondent is stating that Justice Barry Anderson supported the ethics rules that were challenged in the *White* case prior to joining the bench. There is no evidence in the record as to Justice Anderson's position regarding the challenged ethics rules and the fact that he was not yet on the Minnesota Supreme Court when the *White* case was handed down is not enough to show that the statement is factually false. This allegation is dismissed.

### Respondent's Constitutional Challenge

Finally, the Respondent argues that Minn. Stat. § 211B.06 is unconstitutionally overbroad. As discussed above, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face.<sup>102</sup> The panel notes, however, that in a recent challenge to the restrictions on knowingly or recklessly false campaign speech under Minn. Stat. § 211B.06,<sup>103</sup> the Eighth Circuit held that knowingly false campaign speech falls within the protections of the First Amendment's right to free speech and, therefore, any regulation must satisfy the strict scrutiny test: that the restrictions be narrowly tailored to meet a compelling state interest.<sup>104</sup> The court remanded the case to the district court for further proceedings and in a subsequent decision, the U.S. District Court for the District of Minnesota recently held that Minn. Stat. § 211B.06 was not unconstitutionally overbroad with

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<sup>102</sup> G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).

<sup>103</sup> *281 Care Committee v. Arneson*, 638 F.3d 621 (8<sup>th</sup> Cir. 2011).

<sup>104</sup> 638 F.3d at 636. (The court remanded the case to the district court for further proceedings consistent with its order.) In *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590-591 (Minn. 1979), the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 211B.02's predecessor statute (§ 210A.02) holding that since the regulation was directed at false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.

respect to its restrictions on false speech about ballot questions.<sup>105</sup> The Court held that the ballot provisions of Minn. Stat. § 211B.06 reflect a legislative judgment on behalf of Minnesota citizens to guard against the “malicious manipulation of the political process” and that the statute’s provisions are narrowly tailored to serve this compelling interest. Whether the restrictions at issue in this case would withstand strict scrutiny and be found constitutional is not for this Panel to decide.

The Panel finds that a \$600 penalty for each statutory violation is appropriate in this case.

**J.M.C., J.E.L, M.P.R.**

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<sup>105</sup> 281 CARE Committee v. Arneson, Case No. 08-5215, 2013 WL 308901 (D.Minn. Jan. 25, 2013).

68-0320-30147

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

Bonn Clayton,

Respondent.

**AMENDED  
FINDINGS OF FACT,  
CONCLUSIONS AND ORDER**

The above-entitled matter came on for an evidentiary hearing at the Office of Administrative Hearings on February 7 and February 8, 2013, before a panel of three Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam P. Rykken. The record closed on February 26, 2013, with the filing of the Parties' post-hearing briefs.

David Asp, Attorney at Law, Lockridge Grindal Nauen, PLLP, appeared on behalf of Harry Niska, (Complainant). Bonn Clayton (Respondent) appeared on his own behalf without assistance of counsel.

The Panel issued its Findings of Fact, Conclusions and Order on Tuesday, March 12, 2013. After issuing the Order, the Panel became aware of a clerical error that resulted in the omission of two words in Finding 42 on page 9. Therefore, the Findings of Fact, Conclusions and Order issued in this matter on March 12, 2013, is amended to correct the clerical error<sup>1</sup> as follows:

**ORDER**

1. Finding 42 is amended to read as follows:

The Respondent drafted the November 2, 2012, email himself. He did not research the three cases he referenced because he felt he did not have the time to verify the accuracy of the statements so close to the election and he claimed he believed each of the statements was accurate.<sup>2</sup>

A corrected page 9 is attached to this Order.

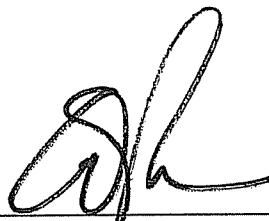
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<sup>1</sup> See, Minn. R. 1400.8300.

<sup>2</sup> Clayton Test.

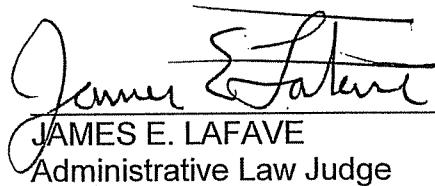
2. In all other respects, the Findings of Fact, Conclusion and Order, and accompanying Memorandum dated March 12, 2013, is reaffirmed and incorporated herein.
3. This Amended Order shall be effective upon issuance.

Dated: March 14, 2013



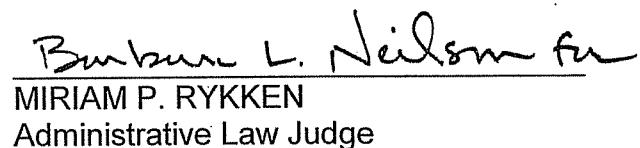
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JEANNE M. COCHRAN  
Presiding Administrative Law Judge



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JAMES E. LAFAVE  
Administrative Law Judge



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MIRIAM P. RYKKEN  
Administrative Law Judge

Republican Party of Minnesota.”<sup>53</sup> The Respondent also noted in his email to Mr. Morgan that the Judicial District Republican Chairs Committee has existed for “more than 10 years,” meets regularly, sometimes at the RPM headquarters, and has had budget items approved by the RPM.<sup>54</sup>

40. In an email to the Respondent sent on October 31, 2012, Mr. Morgan informed the Respondent that the new disclaimer had been reviewed and was found to still be unacceptable. Mr. Morgan stated that the RPM would file a complaint.<sup>55</sup>

41. On November 2, 2012, the Respondent issued an email to the RPM “Judicial Delegates” on behalf of the Chairs of the “Minnesota Judicial District Republican Committees” encouraging them to vote for Dean Barkley over Justice Barry Anderson. The Respondent stated that the Minnesota Judicial District Republican Committees decided to recommend Dean Barkley because Justice Barry Anderson:

voted against Pawlenty on unallotment, he voted against Sen. Scott Newman when Newman challenged the validity of a Ramsey County judge’s [sic] establishing a State Government Budget during the government Shutdown in 2011, and he has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!). He has generally sided with the liberal majority on the Court.<sup>56</sup>

42. The Respondent drafted the November 2, 2012, email himself. He did not research the three cases he referenced because he felt he did not have the time to verify the accuracy of the statements so close to the election and he claimed he believed each of the statements was accurate.<sup>57</sup>

43. The Respondent indicated that he believed Justice Barry Anderson voted against Governor Pawlenty on the unallotment case based generally on something he read in the *Star Tribune* newspaper. Likewise, he believed Justice Barry Anderson voted against Senator Scott Newman and others based on something he read in the *Star Tribune* newspaper. The Respondent did not identify on what he based his belief that Justice Barry Anderson supported “unconstitutional campaign restrictions.”<sup>58</sup>

44. Respondent’s statement in the November 2<sup>nd</sup> email regarding the “unallotment case” refers to *Brayton v. Pawlenty*,<sup>59</sup> in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty’s use of unallotment as

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<sup>53</sup> Clayton Test.

<sup>54</sup> Ex. D.

<sup>55</sup> Ex. E.

<sup>56</sup> Ex. 15.

<sup>57</sup> Clayton Test.

<sup>58</sup> Clayton Test.

<sup>59</sup> 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

2014 WL 902680

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS  
UNPUBLISHED AND MAY NOT BE CITED EXCEPT  
AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Harry NISKA, complainant, Respondent,  
v.  
Bonn CLAYTON, Relator,  
Office of Administrative Hearings, Respondent.

No. A13-0622.

|  
March 10, 2014.

|  
Review Denied June 25, 2014.

Office of Administrative Hearings, File No. 68-0320-30147.

#### Attorneys and Law Firms

David W. Asp, Lockridge Grindal Nauen, P.L.L.P.,  
Minneapolis, MN, for respondent Niska.

Peter A. Swanson, Golden Valley, MN, for relator.

Lori Swanson, Attorney General, St. Paul, MN, for  
respondent Office of Administrative Hearings.

Considered and decided by ROSS, Presiding Judge;  
PETERSON, Judge; and HALBROOKS, Judge.

#### UNPUBLISHED OPINION

ROSS, Judge.

\*1 Bonn Clayton distributed campaign material falsely indicating that the Republican Party of Minnesota endorsed three candidates for the Minnesota Supreme Court in the November 2012 election. His material also incorrectly stated that Justice Barry Anderson voted against former Governor Tim Pawlenty in a highly publicized supreme court case addressing the governor's unallowment authority. A panel of administrative law judges decided that Clayton violated Minnesota Statutes sections 211B.02 and 211B.06 (2012). Clayton appeals by writ of certiorari on constitutional and factual grounds. Because section 211B.02 is constitutional

on its face and as applied to Clayton, and because sufficient evidence supports the panel's finding that Clayton violated it, we affirm in part. But because the panel received insufficient evidence to prove that Clayton acted with reckless disregard for the truth in making a false statement in violation of section 211B.06, we reverse in part.

#### FACTS

Bonn Clayton has held various positions in the Republican Party of Minnesota (RPM) since 1969. Most recently, Clayton served as a member of the First Judicial District Republican Committee. He also served as a member of the Judicial District Republican Chairs Committee (Chairs Committee) formed in 2005. The Chairs Committee met monthly to coordinate events in the state's various judicial districts, promote the judicial planks of the Republican platform, and develop strategy supporting judicial candidates.

The Chairs Committee has little power under the RPM constitution. Before each convention, the RPM forms a judicial election committee to investigate and report on appellate judicial candidates. The judicial election committee reports its findings at the convention. Convention delegates vote on whether to endorse any candidate. If the vote is affirmative, the delegates vote on specific candidate endorsements. The RPM endorses only candidates receiving 60% of the convention vote.

Clayton served as a member of the 2012 judicial election committee and presented the committee report at the convention. The convention delegates voted in favor of making judicial endorsements, but after reconsideration following a discussion about whether to endorse Tim Tingelstad over incumbent Justice David Stras, the convention voted by a two-to-one margin to overturn its previous decision to endorse any candidate. Clayton, who unsuccessfully lobbied the convention delegates to endorse Tingelstad, was present for that vote.

Despite knowing the convention's decision not to endorse any judicial candidate, Clayton sent an email to roughly 7,000 state Republicans on October 18, 2012, promoting a website, judgeourjudgesmn.org, that implied a different result:

Dear Judicial District Delegates and Alternates,

#### EXHIBIT 4

Just before every election, Party leaders begin to get many calls from voters wondering who they should vote for in the Minnesota Judicial races.

So, we have put together a Voters' Guide, which we hope will be helpful.

\*2 Just go to our website [www.judgeourjudgesmn.org](http://www.judgeourjudgesmn.org).

It's just a new website, so it's still very simple. We currently have the names of our three recommended candidates for Supreme Court....

Please also send this link to all of your [basic political organizational unit's] precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates. And send the link to anybody else you can think of!

....

Bonn Clayton, Convener

Judicial District Republican Chairs

Republican Party of Minnesota.

On the promoted website, Clayton posted a "2012 Minnesota Judicial Voters' Guide." The guide "strongly recommended" that Minnesota republicans vote for three supreme court candidates (Dan Griffith, Tim Tingelstad, Dean Barkley), although it never used the term "endorse" or "endorsement." The home page represented that the website was sponsored by the "Republican Party of Minnesota—Judicial District Chairs Committee." The bottom of the page stated, "Prepared and paid for by: Republican Party of Minnesota—Judicial District Republican Chairs." Clayton's name was also listed at the bottom, and his signature line designated, "Republican Party of Minnesota." Another page of the website gave a biography of Tingelstad with similar implications that the RPM supported his candidacy.

The RPM began receiving inquiries expressing confusion about the email and whether the RPM had endorsed judicial candidates. So the RPM sent out an email the following day explaining that it had not endorsed any judicial candidates. It directed readers to its own voters' guide. Clayton's website was shut down for fewer than 10 days.

Clayton continued to promote the website. He sent an email on October 28 to the same 7,000 addressees announcing

that the website was back online. Although Clayton never referenced the "Republican Party of Minnesota" in this email, the website still indicated that it was an RPM product. The RPM's legal counsel, Richard Morgan, sent Clayton an email the next day asking Clayton to remove "Republican Party of Minnesota" from the website and advise all email recipients that any reference to the RPM was mistaken. Clayton changed the statement on the website to "First Judicial District Republican Committee of the Republican Party of Minnesota" and asked Morgan if the change was acceptable. Morgan told him it was not and that the RPM would file a complaint.

Clayton sent four additional emails to the same 7,000 addressees without referencing the RPM. One of the emails urged voters to elect Dean Barkley to the supreme court to replace Justice Barry Anderson. Clayton asserted that Justice Anderson had voted against Governor Pawlenty's unallowment authority, referring to the supreme court decision *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn.2010). The statement was false.

RPM state convention delegate Harry Niska filed a complaint with the Office of Administrative Hearings (OAH), alleging that Clayton falsely indicated that the RPM endorsed three candidates and made false statements about multiple candidates, violating Minnesota Statutes sections 211B.02 and 211B.06 (2012). The case was decided by an administrative law judge (ALJ) panel.

\*3 The three-member ALJ panel heard testimony indicating substantially the facts above. It decided that Clayton violated section 211B.02 (making a false endorsement), based on Clayton's website, and 211B.06 (making a false statement about a candidate), based on the email wrongly reporting Justice Anderson's position in *Brayton*. The OAH fined Clayton \$600 for each violation. Clayton appeals the OAH's determination by writ of certiorari.

## DECISION

Clayton appeals the OAH's decision on four grounds. He maintains that Niska lacked standing to complain to the OAH and that the panel did not have sufficient evidence to find that he violated either statute. He also challenges the constitutionality of Minnesota Statutes section 211B.06 (2012) as applied to him and section 211B.02 (2012) on its face and as applied to him.

## EXHIBIT 4

## I

We reject Clayton's contention that Niska lacked standing to complain to the OAH. Minnesota Statutes section 211B.32 (2012), which governs sections 211B.02 and 211B.06, does not restrict who may file an election complaint. It states passively only that “[a] complaint alleging a violation must be filed with the office.” *Minn.Stat. § 211B.32, subd. 1*. It indicates a temporal restriction (“within one year”), *id.*, subd. 2, and a formal restriction (“in writing, submitted under oath, [and factually detailed]”), *id.* subd. 3. But it says nothing restricting or defining the class of complainants. The statute does not on its face support Clayton's argument.

Relying on caselaw, Clayton asserts that a person has standing to file a complaint only when standing is “conferred by statute or [when the court recognizes] a particular relationship between a person and an actionable controversy.” (Quotation omitted.) Clayton cites *In re Sandy Pappas Senate Committee*, 488 N.W.2d 795, 797 (Minn.1992), in support. Clayton misreads *Pappas*. *Pappas* addressed whether a person who complained to the Minnesota Ethical Practices Board had standing to challenge the board's decision that deemed the accused committee's violations to be merely unintentional and inadvertent. *Id. at 796–97*. It had nothing to do with the complainant's standing to file his complaint in the first place. *Id. at 797–98* (distinguishing standing for judicial review of an agency decision from the ability to participate in an agency proceeding); *see also In re Decertification of Exclusive Representative Certain Emps. of Univ. of Minn., Unit 9*, 730 N.W.2d 300, 304 (Minn.App.2007) (“[P]articipation in an agency proceeding does not guarantee standing to seek review of the agency's decision.”).

Although chapter 211B says nothing to restrict who may lodge an administrative complaint, the legislature elsewhere provides broadly that “[a]ny eligible voter” may contest an election, *Minn.Stat. § 209.02, subd. 1* (2012), or initiate a recall, *see Minn.Stat. § 211C.03* (2012). Considering chapter 211B's silence and its context with these other statutes, we hold that the legislature intended at the very least that “any eligible voter” may file a complaint under chapter 211B. Clayton does not deny that Niska was an eligible voter.

\*4 Clayton separately contends that the OAH lacked jurisdiction over the complaint because the dispute was an internal party issue and Niska did not exhaust all intra-

association remedies. Courts will uphold organizational rules requiring members to solve disputes internally unless those rules violate the law or provide merely an illusory process. *See Rensch v. Gen. Drivers, Helpers & Truck Terminal Emps. Local No. 120*, 268 Minn. 307, 313–16, 129 N.W.2d 341, 345–47 (1964); *Peters v. Minn. Dept. of Ladies of Grand Army of Republic*, 239 Minn. 133, 135–36, 58 N.W.2d 58, 60 (1953). Requiring members to exhaust intra-association remedies respects the contractual obligations of the organization and its members and avoids undue governmental interference with private associations. *Rensch*, 268 Minn. at 313, 129 N.W.2d at 345–46.

But the rule of law developed in *Rensch* and *Peters* does not apply on our facts. Those cases interpreted organizational constitutional provisions that required members to resolve disputes internally. By contrast, Clayton does not identify any provision of the RPM constitution with that sort of requirement. Instead he broadly asserts that disputing party factions should be left to resolve their differences among members. He cites no authority for the proposition, and, in any event, the proposition overlooks the fact that the complaint does not expose a mere intraparty squabble; it claims a violation of law. Clayton's jurisdictional arguments fail.

## II

Clayton contends that the evidence fails to prove that he violated Minnesota Statutes section 211B.06 because Niska did not provide clear and convincing evidence that Clayton made a false statement and that the statement was made with reckless disregard to its truth. *See Minn.Stat. §§ 211B.06, subd. 1, 211B.32, subd. 4*. We will reverse the administrative decision if Clayton meets his burden to demonstrate that the findings were not supported by substantial evidence. *See Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn.App.2007), *review denied* (Minn. Apr. 17, 2007). To prevail, he must show that the record as a whole lacks evidence that a reasonable person would accept as adequate support for the panel's conclusion. *See id.*

Clayton admits that his statement characterizing Justice Barry Anderson's position in the *Brayton* case was false, but he contends that he did not act with reckless disregard for the truth. We have treated the reckless-disregard language in section 211B.06 as being synonymous with actual malice in defamation cases. *Riley v. Jankowski*, 713 N.W.2d 379, 398–99 (Minn.App.2006), *review denied* (Minn. July 19,

## EXHIBIT 4

2006). Actual malice requires more than mere “recklessness” generally applied to civil cases. *Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn.2003). A complainant must demonstrate that the respondent made a false statement while subjectively believing the statement to be false or “probably false.” *Id.* at 655. It is insufficient to show only that “a reasonably prudent man would [not] have published[ ] or would have investigated before publishing,” *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or merely that a person failed to investigate, *Chafoulias*, 668 N.W.2d at 655.

\*5 To determine whether sufficient evidence of Clayton's disregard for the truth exists, we look at the sources of Clayton's information, the information he received, the reliability of his sources, and whether he had any sources at all. *See In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 814 (Minn.2006). Niska testified that Clayton was an “authority figure on judicial elections and judicial candidates” in the Republican party. He emphasized that the *Brayton* decision was highly publicized and that politically interested people likely heard about it. He also testified that Justice Anderson's decision to join the dissent in supporting Pawlenty's claim of unallotment authority was similarly well publicized. Niska conceded, however, that he had no evidence that Clayton knew that Justice Anderson had joined the dissenting opinion or that Clayton maintained serious doubts about Justice Anderson's position. Niska merely repeated that Justice Anderson's vote was easily ascertainable but that Clayton did not avail himself of the accessible information.

Clayton called witnesses who testified that they believed as he had about Justice Barry Anderson's position in the case. One witness expressed confusion given that two Andersons then sat on the supreme court, observing that “an Anderson voted for it and an Anderson voted against it.” Clayton's witnesses also testified that the consensus at a Chairs Committee meeting was that Justice Barry Anderson had opposed Pawlenty's position. And it was only after that meeting that Clayton sent his email representing that Justice Barry Anderson had voted against Pawlenty. Clayton testified that he had not read *Brayton* and could not recall the exact article in the Star Tribune on which he claimed to have based his erroneous belief.

The panel concluded that Clayton acted with reckless disregard for the truth because it discredited Clayton's testimony that his belief came from a Star Tribune article. It

found his testimony incredible because it was vague while his recollections on other matters were clear, deeming his stated belief therefore “not plausible.” In making its credibility determination, the panel relied heavily on the facts that Clayton “could have discovered that the statement was untrue by doing minimal research,” that “[t]he *Brayton* decision was issued in 2010, two years before [Clayton's] statement,” and that the decision had been “widely publicized.” We generally defer to an ALJ panel's credibility determinations. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn.2001). But what purports to be a credibility analysis here reveals that the panel effectively penalized Clayton for failing to investigate, not that it believed he had investigated and knew his statement to be false. But failure to adequately investigate a statement does not equate to actual malice. That a person never read the newspaper account that he cites to support his erroneous belief does not establish reckless disregard for the truth. It may show mistake, confusion, or carelessness, but the statute does not prohibit political advertisements that reflect mere flippancy or even negligence as to truth. Additionally, that Clayton had a lapse in memory regarding one event while he clearly recalls other events is not implausible, nor does it demonstrate that he knew his statement was false or probably false. Anyone with a less-than-perfect memory will recall some things precisely and other things in a fog.

\*6 The panel's credibility assessment rests exclusively on express factors that reveal the panel's legal error. Because the objectively flawed credibility assessment is the *only* support offered or relied on to prove actual malice, we hold that the record does not establish that Clayton acted with actual malice. We therefore reverse the panel's decision that Clayton violated [section 211B.06](#). Because we reverse on this ground, we need not consider the contention that [section 211B.06](#) is unconstitutional on its face or as applied here.

### III

Clayton's next argument is that the panel did not receive substantial evidence that he violated [section 211B.02](#). He appears to assert that the ALJ panel erred by concluding that his actions constituted a false endorsement. A person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates [section 211B.02](#) if he knows that the candidate is not also endorsed by the party. *See In re Ryan*, 303 N.W.2d 462, 465–66 (Minn.1981) (holding that placing

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the terms “DFL” and “LABOR ENDORSED” on campaign materials violated the statute); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn.1979) (finding the use of the initials “DFL” would falsely imply endorsement or support). Clayton used the term “Republican Party of Minnesota” on multiple documents and on his website while promoting candidates who lacked the party's endorsement. Clayton attended the state Republican convention and knew that the party had not endorsed his preferred candidates. The ALJ panel had ample evidentiary support for its finding that his actions knowingly and falsely implied that the RPM endorsed the candidates.

#### IV

Clayton contends that section 211B.02 is unconstitutional on its face. A statute's constitutionality is a question of law, which we review de novo. *Riley*, 713 N.W.2d at 386. While statutes generally carry a presumption of constitutionality, a statute restricting speech does not; the burden rests with the government to demonstrate that a speech-restricting statute is constitutional. *Hornell Brewing Co. v. Minn. Dept. of Pub. Safety*, 553 N.W.2d 713, 716 (Minn.App.1996).

Without dispute, section 211B.02 restricts speech:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate ... has the support or endorsement of a major political party or party unit or of an organization.

Clayton contends that this content-based restriction is facially unconstitutional because it is not narrowly tailored to its objective. Content-based speech restrictions will be upheld only if they pass strict scrutiny. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000). To survive strict scrutiny, a law must be narrowly tailored to serve a compelling government interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010). To be narrowly tailored, the statute must be the “least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 2791, 159 L.Ed.2d 690 (2004). The Supreme Court has held that obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are

constitutionally unprotected categories of speech, and statutes restricting them serve a compelling government interest. See *United States v. Stevens*, 559 U.S. 460, 468–69, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010). Absent from these categories is merely “false speech,” such as Clayton's.

\*7 False speech has traditionally received little protection, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 880, 99 L.Ed.2d 41 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), but it has never been deemed *categorically* unprotected, *United States v. Alvarez*, — U.S. —, 132 S.Ct. 2537, 2547, 183 L.Ed.2d 574 (2012) (plurality opinion); *id.* at 2553 (Breyer, J., concurring); *id.* at 2563 (Alito, J., dissenting). Penalizing all falsehoods theoretically discourages open debate and chills speech. *Gertz*, 418 U.S. at 340–41, 94 S.Ct. at 3007. The Supreme Court has intimated that false statements are unprotected only when the statements are associated with related harms, such as defamation or fraud. *Alvarez*, 132 S.Ct. at 2544–45 (plurality opinion).

But false political speech can be electorally toxic. During the election season, “false statements, if credited, may have serious adverse consequences for the public at large.” *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349, 115 S.Ct. 1511, 1520, 131 L.Ed.2d 426 (1995). Section 211B.02 prohibits only those false statements that state or imply a false endorsement that may mislead the public and harm the political process. See *Schmitt*, 275 N.W.2d at 591. The state's interest in preventing electorate confusion is therefore compelling. See *McIntyre*, 514 U.S. at 344, 349, 115 S.Ct. at 1517, 1520; *Talley v. California*, 362 U.S. 60, 63–64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960). We repeat here that avoiding false speech that misleads the public regarding elections is a compelling interest. We turn to Clayton's arguments that 211B.02 is not narrowly tailored to this compelling interest.

#### Overbreadth

Clayton first argues that the statute is not narrowly tailored because it is overbroad and therefore not the least restrictive means to serve the government's interest. A statute that limits speech is unconstitutionally overbroad “if a substantial amount of protected speech is prohibited or chilled” by the state's constitutional application of a statute. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S.Ct. 1389, 1404, 152 L.Ed.2d 403 (2002). To violate the Constitution, however, the overbreadth must substantially sweep outside the statute's plainly legitimate aim. *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008). We

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will not invalidate a statute merely because a challenger can predict or envision circumstances in which the statute might be applied unconstitutionally. *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16, 93 S.Ct. 2908, 2917–18, 37 L.Ed.2d 830 (1973); see *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1 (1988) (requiring the challenger to demonstrate “from the text of [the law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally”). Unconstitutional overbreadth also does not occur when the overbreadth can be “cured through case-by-case analysis of the fact situations to which its sanctions … may not be applied.” *Broadrick*, 413 U.S. at 615–16, 93 S.Ct. at 2918. Applying the overbreadth doctrine to invalidate a statute is a “strong medicine” that should be “used sparingly and only as a last resort.” *N.Y. State Club Ass'n*, 487 U.S. at 14, 108 S.Ct. at 2234 (quotation omitted).

\*8 Clayton gives two reasons why he believes the law is overbroad—it prohibits constitutionally protected false speech associated with free debate and it prohibits factually accurate statements that imply a false endorsement. We read the law differently. Section 211B.02 prohibits speakers from “knowingly mak[ing], directly or indirectly, a false claim stating or implying that a candidate … has the support or endorsement of a” party or organization. It punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization. *In re Ryan*, 303 N.W.2d at 467. It prohibits only those statements that can be read as endorsements. *Schmitt*, 275 N.W.2d at 591; see *In re Contest of Election in DFL Primary Election Held on Tuesday, September 13, 1983*, 344 N.W.2d 826, 830–31 (Minn.1984). The statute therefore prohibits only claims of support and only when those claims are false.

So construed, the statute does not prohibit or chill a “substantial amount” of protected speech. See *Williams*, 553 U.S. at 297, 128 S.Ct. at 1841. Clayton contends that section 211B.02 may chill speech because speakers may fear punishment if they make a false statement. He is correct that allowing false statements may benefit the marketplace of ideas, *Alvarez*, 132 S.Ct. at 2544–45 (plurality opinion), but Clayton’s concern with respect to section 211B.02 is misplaced. By prohibiting only “knowingly” false speech, the statute does not touch on inadvertent falsehoods that contribute to the free expression of ideas.

Clayton overstates the case by urging that prohibiting statements that “imply” false endorsements violates the Constitution because factually accurate statements might imply false support. We are aware of no circumstance in which the statute has been applied to punish a speaker for a string of true statements that merely implied a false endorsement. And the supreme court’s limitation that the statute does not punish words of mere association undermines the argument further. Clayton does not convince us that section 211B.02 presents “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). He also has not presented any less restrictive alternatives that would appropriately serve the government’s interest. The statute is not unconstitutionally overbroad.

#### ***Underinclusion***

Clayton also argues that the statute fails strict scrutiny because it is underinclusive. A statute is unconstitutionally “underinclusive” if it prohibits some speech for a compelling government interest but does not prohibit other speech that also impedes the government interest and the distinction is viewpoint based. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992). Clayton specifically argues that because section 211B.02 refers only to “major political parties,” “party units,” and “organizations” but not to “minor political parties,” it is unconstitutionally underinclusive. The argument fails on the mistaken premise that false endorsements about minor political parties are not governed by section 211B.02.

\*9 We ascribe meaning to statutorily undefined words based on “their common and approved usage.” Minn.Stat. § 645.08(1) (2012). “Organization” is not defined in Minnesota Statutes section 200.02 (2012). But it is a simple word with a common usage that encompasses political parties, including minor political parties. When the words of a statute are explicit and unambiguous, the legislature has asked us to accept the statute as written. See Minn.Stat. § 645.16 (2012). Clayton reasonably observes that the term “organization,” construed based on its plain meaning, might render the term “major political party” superfluous—a result that may itself suggest an ambiguity. See *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn.2000). He urges us to apply the interpretive doctrine *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) to avoid the superfluous result. Under that doctrine, when a statute lists

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certain terms but not others, the interpreting court should infer that the list is exclusive unless the context indicates otherwise. *See State v. Caldwell*, 803 N.W.2d 373, 383 (Minn.2011); *see also* Minn.Stat. § 645.19 (2012).

But the doctrine is only an interpretive guide, not a syntactic straightjacket, and it does not apply here. Clayton asks us to apply the doctrine to infer that, by listing “major political party” without expressly listing “minor political party,” the legislature purposefully excluded false endorsements of minor political parties from the statute. An inference arising from the doctrine is “justified [only] when the language of the statute supports such an inference.” *Caldwell*, 803 N.W.2d at 383. As a whole, the statutory language here cannot support the inference. *See id.* (explaining that applying *expressio unius est exclusio alterius* “is not justified when the omitted term is encompassed by the enumerated terms”). The omitted term “minor political party” is encompassed by the enumerated term “organization” because political parties—major or minor—are of course organizations.

The legislature also asks courts to interpret any ambiguous statute in a manner that avoids “absurd” or “unreasonable” results. Minn.Stat. § 645.17(1) (2012). Clayton’s reading of the statute, which would penalize a person for falsely claiming the political support or endorsement of *every* individual, *every* political party, and *every* conceivable organization *except only* “minor political parties” invites an absurd and unreasonable result. Recall that section 211B.02 has broad express reach to protect entities and even individuals from being falsely dubbed as supporters of any candidate. It prohibits any person from “knowingly mak[ing] ... a false claim stating or implying that a candidate ... has the support or endorsement of a major political party or party unit or of an organization,” or from “stat[ing] in written campaign material that the candidate ... has the support or endorsement of an individual without first getting written permission.” Minn.Stat. § 211B.02. What sense is there in punishing a campaign worker for falsely claiming the support of the International Falls Chamber of Commerce (“a membership-driven *organization* committed to providing a voice for [the International Falls] business community”<sup>1</sup>) but not for falsely claiming the support of the Green Party of Minnesota (“a grassroots *organization* ”<sup>2</sup> that is also a Minnesota *minor political party* )? How

can we suppose that the legislature intended to allow a candidate to falsely claim the support of the Libertarian Party of Minnesota, another “minor political party,” but to penalize her for falsely claiming the support of her next door neighbor, an “individual”?

\*10 We reject Clayton’s request to infer an absurd, supposedly unconstitutional rendering of the statute, which, on its face, unambiguously seeks to protect the electorate from false statements of organizational and individual political endorsement.

## V

Clayton also makes an as-applied challenge to the ALJ panel’s determination that he violated section 211B.02. We review the challenge de novo. *See In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 829 (Minn.2011).

Clayton contends that section 211B.02 was unconstitutionally applied to him because it did not require the RPM to engage in counterspeech to rebut his falsehoods. When applying strict scrutiny, the government’s restriction “must be the least restrictive means among *available, effective* alternatives.” *Alvarez*, 132 S.Ct. at 2551 (emphasis added) (quotation omitted). Unlike in *Alvarez*, where a plurality of the Court struck down a law prohibiting anyone from falsely claiming to be a medal-of-honor recipient because evidence in that case showed that “counterspeech, ... [and] refutation, can overcome the lie,” *id.* at 2549, that lie-defeating solution is inadequate here. At stake in *Alvarez* was the dishonest speaker’s reputation; at stake under the statute in this case is an accurately informed electorate. The state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections. Clayton’s as-applied challenge fails.

### Affirmed in part and reversed in part.

### All Citations

Not Reported in N.W.2d, 2014 WL 902680

### Footnotes

- 1 Int’l Falls Area Chamber Com., <http://ifallschamber.com> (last visited Feb. 26, 2014) (emphasis added).
- 2 Green Party Minn., <http://mngreens.org> (last visited Feb. 26, 2014) (emphasis added).

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2017 WL 957717

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*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).*

Court of Appeals of Minnesota.

CITY OF GRANT, BY AND THROUGH its City Clerk, Kim POINTS, Respondent,  
v.

John D. SMITH, Relator.

A16-1070

|

Filed March 13, 2017

|

Review Denied May 30, 2017

### Synopsis

**Background:** City clerk filed complaint against treasurer of pro-charter group and his wife, alleging a violation of the Fair Campaign Practices Act. The Office of Administrative Hearings imposed a \$250 penalty on treasurer. Treasurer and his wife appealed by way of a writ of certiorari.

**Holdings:** The Court of Appeals, Johnson, J., held that:

[1] city clerk had standing to file a complaint with the Office of Administrative Hearings;

[2] city was an organization within meaning of statutory provision that prohibited a person or candidate from making a false claim or implying that a ballot question had the support or endorsement of an organization;

[3] substantial evidence existed to support hearing panel's finding that treasurer violated statutory provision that prohibited a person or candidate from making a false claim or implying that a ballot question had the support or endorsement of an organization;

[4] statutory provision that simply prohibited a speaker from misrepresenting himself, herself, or itself by purporting to make a statement on behalf of a major political party or party unit or of an organization was narrowly drawn to serve a compelling governmental interest by proscribing political speech that fraudulently misrepresented the identity of the speaker, as required to survive First Amendment right to free speech strict-scrutiny analysis;

[5] city was not required to prove that treasurer acted with actual malice in support of its claim; and

[6] the fact that administrative hearing panel ultimately dismissed treasurer's wife did not mean the city's complaint was frivolous, for purposes of granting wife's request for reimbursement of her costs.

Affirmed.

West Headnotes (6)

[1] **Election Law**

🔑 [Complaint; notice of violation](#)

City clerk had standing to file a complaint with the Office of Administrative Hearings against treasurer of pro-charter group and his wife under the Fair Campaign Practices Act, after the group distributed campaign literature supporting a proposed charter that bore the city's logo and other design features that appeared in city documents and on the city's website that may have falsely implied that the city was endorsing the proposed charter; the Act did not place any limits on who may file a complaint, and the hearing panel concluded that the city clerk sustained a cognizable injury because of the nature of her responsibilities as city clerk. [Minn. Stat. Ann. §§ 211B.32 \(2\),\(3\).](#)

[Cases that cite this headnote](#)

[2] **Election Law**

🔑 [Fair campaign practices; false statements](#)

City was an organization within meaning of statutory provision that prohibited a person or candidate from making a false claim or

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implying that a ballot question had the support or endorsement of an organization; pursuant to Supreme Court precedent interpreting a different statute, the definition of an organization could encompass a state government, which logically would encompass a municipal government. [Minn. Stat. Ann. § 211B.02](#).

Cases that cite this headnote

**[3] Election Law**

↳ [Hearing; evidence](#)

Substantial evidence existed to support hearing panel's finding that treasurer of pro-charter group violated statutory provision that prohibited a person or candidate from making a false claim or implying that a ballot question had the support or endorsement of an organization, by knowingly making a false claim that the city endorsed certain positions on ballot questions; treasurer admitted that some of the group's mailings included the city's logo, he testified that he knew the city had not taken any official position on the ballot questions, and further testified that he did not think the city had any protectable interest in its logo. [Minn. Stat. Ann. §§ 14.69\(e\), 211B.02](#).

Cases that cite this headnote

**[4] Constitutional Law**

↳ [Political speech, beliefs, or activity in general](#)

[Election Law](#)

↳ [Fair campaign practices; false statements](#)

Statutory provision that simply prohibited a speaker from misrepresenting himself, herself, or itself by purporting to make a statement on behalf of a major political party or party unit or of an organization was narrowly drawn to serve a compelling governmental interest by proscribing political speech that fraudulently misrepresented the identity of the speaker, as required to survive First Amendment right to free speech strict-scrutiny analysis. [U.S. Const. Amend. 1.; Minn. Stat. Ann. § 211B.02](#).

Cases that cite this headnote

[5]

**Constitutional Law**

↳ [Political speech, beliefs, or activity in general](#)

[Election Law](#)

↳ [Fair campaign practices; false statements](#)

City was not required to prove that treasurer of pro-charter group acted with actual malice in support of its claim that the treasurer knowingly violated the statutory provision that prohibited a person or candidate from making a false claim or implying that a ballot question had the support or endorsement of an organization; statute did not constitute an unconstitutional abridgment of the right to free speech. [U.S. Const. Amend. 1; Minn. Stat. Ann. § 211B.02](#).

Cases that cite this headnote

[6]

**Election Law**

↳ [Costs and Fees](#)

The fact that administrative hearing panel ultimately dismissed pro-charter group's treasurer's wife from city's case alleging a knowing violation of statute that prohibited a person or candidate from making a false claim or implying that a ballot question had the support or endorsement of an organization did not mean the city's complaint was frivolous, for purposes of granting wife's request for reimbursement of her costs, where wife requested reimbursement of her costs in conjunction with her prehearing motion to dismiss, and at that stage of the proceeding all facts in the city's complaint were considered to be true, including that wife's name was listed on the group's literature among the persons supporting its viewpoints, and her name and home address appeared on literature that the city alleged falsely implied the city endorsed a proposed charter. [Minn. Stat. Ann. § 211B.36\(3\)](#).

Cases that cite this headnote

Office of Administrative Hearings, File No. OAH 8-0325-33077

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## Attorneys and Law Firms

Amanda E. Prutzman, Eckberg Lammers, P.C., Stillwater, Minnesota (for respondent)

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Considered and decided by [Tracy M. Smith](#), Presiding Judge; [Johnson](#), Judge; and [Reyes](#), Judge.

## UNPUBLISHED OPINION

[JOHNSON](#), Judge

**\*1** The City of Grant held a special election in which residents voted on a proposed city charter. Before the election, a group of residents distributed campaign literature supporting the proposed charter. The literature bore the city's logo and other design features that appear in city documents and on the city's website. The city clerk filed a complaint alleging a violation of the Fair Campaign Practices Act on the ground that the group's campaign literature falsely implied that the city was endorsing the proposed charter. After an evidentiary hearing, a panel of three administrative law judges found a violation of the act and imposed a \$250 penalty on John D. Smith, a member of the pro-charter group who was found to have taken certain actions that caused the campaign literature to be sent to city residents. Smith and his wife challenge the hearing panel's decision on multiple grounds. We affirm.

## FACTS

The City of Grant is a statutory city of approximately 4,000 residents in Washington County. It was a farming community in prior decades but has become increasingly residential. In its printed materials and on its website, the city often uses a logo, which consists of a depiction of a log cabin in front of two pine trees, the years in which the city was organized and incorporated, and the slogan, "A Home in the Country." When the city uses the logo on its newsletter, it superimposes the words "Grant News" over the log cabin.

In October 2015, the city held a special election on two questions. In the first ballot question, residents were asked whether the city should establish a home-rule charter.<sup>1</sup> In

the second ballot question, residents were asked whether to discharge the city's charter commission.<sup>2</sup> The city itself did not take a position on either ballot question.

Groups of city residents organized on both sides of the ballot questions and took various actions to promote their respective points of view. A group called the Rally for the Charter Committee (RFTCC) supported the proposed charter. John D. Smith (hereinafter "Smith") was the treasurer of the group. He filed a campaign finance report on behalf of the group, and he listed his home address as the mailing address for the group. He attended approximately two-thirds of the group's meetings. His wife, Karen Y. Smith, did not attend any RFTCC meetings and was not actively involved in the campaign.

**\*2** Before the election, RFTCC distributed campaign literature, including a one-page flyer and a tri-fold brochure. Both the flyer and the brochure urged residents to vote in the affirmative on the first question and in the negative on the second question. At the top of the flyer is the city logo. Near the logo are the words "City of Grant Minnesota" in a distinctive typeface that is very similar to the typeface the city uses for the same words in its printed materials and on its website. At the bottom of the flyer is the phrase, "Prepared and paid for [by] Rally for [the] Charter Committee," with a mailing address that is the Smiths' home address.

The tri-fold brochure is printed on both sides and folded in thirds such that it contains six panels. When folded, one of the external panels includes a space for the mailing address of the recipient and, in the space for a return address, the city logo with the words "Grant News" superimposed over the log cabin. Next to the logo are the words, "Reminder! City of Grant Special Election," and information about the date and hours of the special election and the place where the recipient could vote. The other external panel depicts a sample ballot, with votes superimposed in favor of the first question and against the second question. Inside the brochure, two panels contain text explaining the issues and urging voters to approve the charter. One panel contains four photographs with the city logo in the middle. And one panel lists city residents who support the proposed charter, including "John & Karen Smith." At the bottom of the brochure is the phrase, "This message prepared and paid for by Rally for the Charter Committee," with a mailing address that is the Smiths' home address.

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Residents received the flyer in September 2015. The brochure was sent by mail in October 2015. Thereafter some recipients expressed concern that the literature implied that the city was endorsing the proposed charter. One married couple residing in the city sent an e-mail message to the city clerk, Kim Points, stating:

We found the attached notice on our mailbox this morning and are outraged that the Rally for Charter Committee is using the official City of Grant letterhead for the purpose of advancing their cause. We are hopeful that action will be taken by the City immediately to stop this unethical (and likely unlawful) election activity.

One city council member received the brochure, noticed the city logo, and contacted Points to ask whether the city had authorized the brochure. Points also received other questions and complaints about the mailings. In response to the complaints, Points placed a disclaimer on the city's website to clarify that the city did not have an official position on either ballot question. The city attorney sent a cease-and-desist letter to the Smiths, demanding that they stop using the city logo in RFTCC mailings.

On election day, the first question failed, and the second question passed. In other words, voters rejected the proposed charter and dissolved the charter commission.

In November 2015, a complaint was filed with the Office of Administrative Hearings (OAH), alleging that John Smith and Karen Smith made false claims of endorsement, in violation of the Fair Campaign Practices Act. *See Minn. Stat. § 211B.02 (2016)*. The complainant was identified as "City of Grant by City Administrator / Clerk, Kim Points through City Attorney Nicholas J. Vivian." The complaint was signed by Vivian.

A panel of three administrative law judges (ALJs) conducted an evidentiary hearing in May 2016. The city called five witnesses: Points, Smith, a city council member, and two city residents. Points testified that, as city clerk, she administers city elections, maintains the city's records, assembles the city's newsletter, and posts information on the city's website. Points testified that the logo on RFTCC's literature is the city's logo and that the words "City of Grant Minnesota" on the

literature are in the same typeface in which the same words are shown on the city's website. The city introduced exhibits that visually illustrated Points's testimony. The city council member and the two residents testified that they received RFTCC's literature and became concerned that some residents would be misled into believing that the city had sent the literature and was endorsing the charter. The city council member testified that she believed that the brochure implied that the city supported RFTCC's position. One of the residents testified that she had gone door to door to advise residents that the literature was not sent by the city.

\*3 Smith testified that he arranged for the printing and the mailing of the brochure but did not prepare the flyer or arrange for it to be printed. He testified that the city logo on one panel of the brochure was provided by the printer and that he decided to not change the brochure to omit the logo. He testified that the "Grant News" logo in the return-address field of the brochure was simply "an attention-getter" and that he chose it instead of the log cabin logo because of the word "news." But he testified that the logo "wasn't intended as any attempt to indicate this was coming from the City." He testified further that he hand-delivered some literature, possibly including the flyer, to newspaper receptacles of city residents.

After the city rested its case, Karen Smith moved for dismissal of the complaint with respect to her, and the hearing panel granted her motion. She then requested reimbursement of her costs. The hearing panel denied that request on the ground that the brochure stated that Karen Smith supported RFTCC and that RFTCC "was apparently ... headquartered at" her home, which allowed "an inference that she was involved in the development of the literature that bore her address."

In June 2016, the hearing panel issued its findings of fact, conclusions of law, and order. The hearing panel concluded that Smith knowingly used the city's "logos and symbols" in a way that "falsely implied that the City of Grant endorsed approval of Ballot Question 1 and opposed approval of Ballot Question 2." The hearing panel imposed on Smith a civil penalty of \$250. Smith moved for reconsideration, but the hearing panel denied the motion on the ground that there is no authorization in the Fair Campaign Practices Act for a post-hearing motion for reconsideration. Both John Smith and Karen Smith appeal by way of a writ of certiorari.

## DECISION

The statute on which this matter is based provides as follows:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

[Minn. Stat. § 211B.02 \(2016\)](#). A person who wishes to seek a remedy for a violation of [section 211B.02](#) may file a complaint with OAH. [Minn. Stat. §§ 211B.31](#), .32, subds. 2, 3 (2016). A panel of three ALJs must conduct an evidentiary hearing within no more than 90 days and must issue a decision within no more than 14 days. [Minn. Stat. § 211B.35](#), subds. 1, 3 (2016).

“A party aggrieved by a final decision” on a fair-campaign-practice complaint “is entitled to judicial review of the decision as provided in sections 14.63 to 14.69.” [Minn. Stat. § 211B.36](#), subd. 5 (2016). This court may reverse or modify an administrative decision only if it (a) violates constitutional provisions; (b) exceeds the authority of the agency; (c) was made using unlawful procedure; (d) was affected by an error of law; (e) is unsupported by substantial evidence; or (f) is arbitrary or capricious. [Minn. Stat. § 14.69 \(2016\)](#). “A presumption of correctness attaches to an agency decision, and deference is shown to an agency’s conclusions in the area of its expertise.” [In re 2005 Adjustment of Charges](#), 768 N.W.2d 112, 119 (Minn. 2009). “An agency’s conclusions are not arbitrary and capricious if a rational connection between the facts found and the choice made is articulated.” [Fine v. Bernstein](#), 726 N.W.2d 137, 142 (Minn. App. 2007), review denied (Minn. Apr. 17, 2007).

## I. Standing

\*4 [1] Smith first argues that Points did not have standing to file a complaint under the Fair Campaign Practices Act.

The issue of standing typically arises in a civil action that is commenced in district court. In such a case, the plaintiff must have “a sufficient stake in a justiciable controversy to seek relief from a court.” [Enright v. Lehmann](#), 735 N.W.2d 326, 329 (Minn. 2007). Standing may be acquired in either of two ways: “either the plaintiff has suffered some ‘injury-in-fact’ or the plaintiff is the beneficiary of some legislative enactment granting standing.” [State by Humphrey v. Philip Morris Inc.](#), 551 N.W.2d 490, 493 (Minn. 1996). The parties have not cited any caselaw concerning standing in the OAH, and we are unaware of any such caselaw.

Smith raised the issue of standing at the evidentiary hearing. The hearing panel expressly discussed and resolved the issue in its decision on the merits. The hearing panel initially noted that the act does not impose any limits on who may file a complaint. The hearing panel also noted that Points’s employment by the city made her responsible for safeguarding city property and administering elections, that she fielded complaints about RFTCC’s literature, and that she posted a disclaimer on the city’s website stating that the city was not taking a position with respect to the ballot questions. The hearing panel concluded that Points had an interest in enforcing the act in light of the duties of her position and, thus, had standing to file the complaint.

On appeal, Smith contends that Points did not have standing because there is no legislative authorization for a city clerk to file a complaint under the Fair Campaign Practices Act.<sup>3</sup> As an initial matter, we question whether Points is the complainant. The complaint itself states that the complainant is “City of Grant by City Administrator / Clerk, Kim Points through City Attorney Nicholas J. Vivian.” The complaint was signed by only one person, the city attorney. Smith does not contend that the city did not have standing to file the complaint.

In any event, Smith’s contention ignores the reasoning of the hearing panel, which did not conclude that Points had standing pursuant to a legislative enactment. Rather, the hearing panel concluded that Points sustained a cognizable injury because of the nature of her responsibilities as city clerk. Smith does not challenge the hearing panel’s findings

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concerning Points's duties. The hearing panel correctly noted that the Fair Campaign Practices Act does not place any limits on who may file a complaint. The act states only that a complaint "must be in writing, submitted under oath, and detail the factual basis for the claim that a violation of law has occurred" and that it must be filed with OAH within one year. [Minn. Stat. § 211B.32, subds. 2, 3.](#)

\*5 In light of the evidentiary record and the lack of any restrictions in the statute concerning who may file a complaint, the hearing panel did not err by concluding that Points had standing to file the complaint with OAH.

## II. City as "Organization"

[2] Smith next argues that the hearing panel erred by concluding, "The City is an 'organization' within the meaning of [Minn. Stat. § 211B.02](#)."

As stated above, [section 211B.02](#) prohibits "a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an *organization*." [Minn. Stat. § 211B.02](#) (emphasis added). The term "organization," as used in [section 211B.02](#), is not defined within the statute. The hearing panel adopted the following definition: "A body of persons (such as a union or corporation) formed for a common purpose." *Black's Law Dictionary* 1210 (9th ed. 2009). Smith contends that the term should be interpreted narrowly to include only private political organizations but not governmental entities.<sup>4</sup>

To resolve Smith's argument, we must engage in statutory interpretation. We begin the task of interpreting a statute by asking "whether the statute's language, on its face, is ambiguous." *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute is unambiguous if it "is susceptible to only one reasonable interpretation." *Nelson v. Schlener*, 859 N.W.2d 288, 292 (Minn. 2015). If a statute is unambiguous, we "interpret the words and phrases in the statute according to their plain and ordinary meanings." *Graves v. Wayman*, 859 N.W.2d 791, 798 (Minn. 2015). A statute is ambiguous, however, if it has "more than one interpretation." *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006) (quotation omitted). If a statute is ambiguous, we apply "the canons of statutory construction to determine its meaning." *County of Dakota v. Cameron*, 839 N.W.2d 700, 705 (Minn. 2013).

The common meaning of the word "organization," in the sense it is used in [section 211B.02](#), is "[a] group of persons organized for a particular purpose; an association," or "[a] structure through which individuals cooperate systematically to conduct business." *American Heritage Dictionary* 1275 (3d ed. 1992). That definition does not exclude a municipality or any other governmental entity. The definition adopted by the hearing panel previously was adopted by the supreme court in a case involving another statute. See *Nichols v. State*, 858 N.W.2d 773, 777 (Minn. 2015) (interpreting [Minn. Stat. § 181.64](#) and quoting *Black's Law Dictionary* 1274 (10th ed. 2014)). The supreme court noted that the word "could encompass the State." *Id.* If the definition of the word could encompass a state government, it is logical to conclude that the definition also could encompass a municipal government. The word is not limited or restricted in any way as used in [section 211B.02](#). Accordingly, we interpret [section 211B.02](#) to include municipalities within the meaning of "organization."

\*6 Thus, the hearing panel did not err by concluding that the city is an organization for purposes of [section 211B.02](#).

## III. Findings of Fact

[3] Smith next argues that the hearing panel erred in certain findings of fact. We review Smith's arguments to determine whether the hearing panel's decision was supported by substantial evidence. See [Minn. Stat. § 14.69\(e\)](#); *In re Application of Minn. Power*, 838 N.W.2d 747, 757 (Minn. 2013). To satisfy this standard, an agency's finding must be adequately explained and must be a reasonable conclusion based on the record. *In re Denial of Eller Media Co.'s Applications*, 664 N.W.2d 1, 7 (Minn. 2003). "We defer to an agency's conclusions regarding conflicts in testimony" and "inferences to be drawn from testimony." *In re Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

Smith's primary argument concerns the hearing panel's finding that he "knowingly made a false claim that the City endorsed" certain positions on the ballot questions. (Emphasis added.) As an initial matter, he contends that the hearing panel erred because its legal conclusion was not based on an accompanying finding of fact. Smith is correct that the statement quoted above is made under the heading "Conclusions of Law," not in the previous section under the heading "Findings of Fact." But the headings are immaterial. We construe findings of fact and conclusions of law according

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to their true nature, regardless of labels. Specifically, “a fact found by the court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact.” *Big Lake Lumber, Inc. v. Security Prop. Invs., Inc.*, 836 N.W.2d 359, 366, n.8 (Minn. 2013) (quotation omitted). Whether a person knowingly made a false claim is a question of fact. *In re Contest of Election in DFL Primary*, 344 N.W.2d 826, 830 (Minn. 1984). Accordingly, we construe the hearing panel’s determination that Smith acted knowingly as a finding of fact.

Smith argues that the city failed to prove that he knowingly violated [section 211B.02](#). A knowing violation requires proof that he “knew that his literature falsely claimed or implied” that the city had endorsed RFTCC’s position on the ballot questions. *In re Ryan*, 303 N.W.2d 462, 467 (Minn. 1981). Smith contends that there is a lack of evidence of culpable knowledge because he denied any knowledge that RFTCC’s literature made a false claim. But other evidence tends to show that Smith knew that the literature made a false claim. Smith admitted that some of the mailings he delivered bore the city’s logo. He testified that he knew that the city had not taken any official position on the ballot questions. He testified that he knew that RFTCC’s literature reproduced the sample ballot that had been published by the city. He testified that RFTCC used the city’s “Grant News” logo to capitalize on the meaning of the word “news.” He also testified that he thought about whether the literature was within permissible bounds and concluded that the city did not have any protectable interest in its logo and that RFTCC’s use of the city’s logo would not be confusing. That evidence is similar to the evidence introduced in the *DFL Primary* case, in which the candidate testified that she “used the sample ballot because it was a common campaign technique used to influence voters,” which demonstrated that the candidate knowingly implied that she had the endorsement of the DFL party. *DFL Primary*, 344 N.W.2d at 831. Furthermore, the evidence establishing that the literature made a false claim of endorsement also supports an inference that Smith knew that the literature made a false claim of endorsement. *See State v. Siirila*, 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971) (concluding that circumstantial evidence is sufficient to establish knowledge). To be more specific, the flyer and the brochure were introduced into evidence as exhibits, as were exemplars of the city’s printed materials and website, and the hearing panel naturally was able to compare those documents to each other. We have reviewed the exhibits as well and are struck by the similarity of the RFTCC literature to the city’s printed materials and website in ways that are difficult to describe in words but surely were obvious to the person

or persons responsible for sending them. *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring). Thus, the hearing panel’s determination that Smith knowingly made a false claim is supported by substantial evidence.

\*7 Smith challenges a few other findings of the hearing panel on peripheral issues. For example, Smith challenges factual statements concerning the year in which the city adopted its logo, the dates stated in e-mail messages that may have been incorrectly stated, and whether a logo was “small.” None of these factual issues is material. Whether these factual statements are correct or incorrect has no effect on the hearing panel’s ultimate conclusion. For that reason, we need not consider Smith’s arguments on immaterial factual issues.

Thus, because the hearing panel’s factual findings are supported by substantial evidence, the hearing panel did not err in its findings of fact.

#### IV. Constitutionality

Smith next argues that the hearing panel’s decision is in conflict with the United States Constitution, for three reasons.

##### A. First Amendment Challenge

[4] Smith argues that [section 211B.02](#) violates his First Amendment right to free speech because it penalizes political speech without a compelling governmental interest. In response, the city argues that [section 211B.02](#) serves a compelling interest by “preventing electorate confusion and avoiding false speech that misleads the public regarding elections and harm[s] the political process.”

A content-based restriction on a person’s speech is presumed to be unconstitutional, and the burden lies with the government to demonstrate that such a restriction is constitutional. *State v. Melchert-Dinkel*, 844 N.W.2d, 13, 18 (Minn. 2014). “Content-based restrictions on speech survive First Amendment strict-scrutiny analysis only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end.” *Prolife Minnesota v. Minnesota Pro-Life Comm.*, 632 N.W.2d 748, 753 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A statute is narrowly tailored if it advances a compelling state interest in the “least restrictive means among available, effective alternatives.”

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*Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004).

We do not characterize [section 211B.02](#) as a content-based restriction in the sense that it regulates the content of the speaker's support or endorsement of (or opposition to) a particular candidate or ballot question. Rather, [section 211B.02](#) is a content-based restriction only insofar as it regulates speech concerning the identity of the speaker. [Section 211B.02](#) simply prohibits a speaker from misrepresenting himself, herself, or itself by purporting to make a statement on behalf of “a major political party or party unit or of an organization.” But the United States Supreme Court has stated that “the identity of the speaker is no different from other components of the document's content” and, thus, is subject to First Amendment protection. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348, 115 S. Ct. 1511, 1519 (1995). The Supreme Court also has stated that a state has a legitimate “interest in preventing fraud” in that type of speech and that the state's interest “carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.” *Id.* at 348–49, 115 S. Ct. at 1519–20.

Although a state may not constitutionally prohibit anonymous leaflets, *see id.* at 357, 115 S. Ct. at 1524, a leaflet that misrepresents the identity of its author is another matter. In another recent case, the United States Supreme Court upheld the constitutionality of a state law that allows for public disclosure of the signatures on a petition for a referendum. *John Doe No. 1 v. Reed*, 561 U.S. 186, 200–02, 130 S. Ct. 2811, 2821 (2010). The Court reasoned that the state has a compelling interest in preserving the integrity of the electoral process and preventing or detecting fraudulent signatures, “which not only may produce fraudulent outcomes, but [may] ha[ve] a systemic effect as well” by “driv[ing] honest citizens out of the democratic process and breed [ing] distrust of our government.” *Id.* at 197, 130 S. Ct. at 2819 (quotation omitted). That is essentially the city's argument in this case. Our supreme court has recognized that preventing voter confusion in an election is a compelling state interest. *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979). Accordingly, we agree with the city that the state has a compelling interest in proscribing political speech that fraudulently misrepresents the identity of the speaker.

\*8 Smith also argues that [section 211B.02](#) is not narrowly tailored because it proscribes not only statements that expressly state a false claim of endorsement but also

statements that merely *imply* such a false claim. In response, the city cites *Schmitt*, in which the supreme court concluded that a predecessor statute was “narrowly drawn” to serve a compelling governmental interest because it was “directed specifically at false claims of endorsement or support.” *Schmitt*, 275 N.W.2d at 590–91 (applying Minn. Stat. § 210A.02 (1978)). The version of the statute at issue in *Schmitt* was identical insofar as Smith's argument is concerned because it prohibited a person from “mak[ing], directly or indirectly, a false claim stating or *implying* that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization.” Minn. Stat. § 210A.02 (1978) (emphasis added). Smith's argument that [section 211B.02](#) is not narrowly tailored is foreclosed by *Schmitt*.

Thus, [section 211B.02](#) does not violate Smith's First Amendment right to free speech.

## B. Challenge Concerning Actual Malice

[5] Smith next argues that the hearing panel erred by not requiring the city to prove that he acted with actual malice. In response, the city argues that Smith failed to preserve this argument because he did not present it to the hearing panel. The city is correct that Smith did not present the argument to the hearing panel. But Smith did not have an obligation to do so because an ALJ or panel of ALJs is not empowered to declare a statute facially unconstitutional. *Pine County v. State Dep't of Natural Resources*, 280 N.W.2d 625, 629 (Minn. 1979); *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499–500 (Minn. App. 1993).

Smith relies on the United States Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), in which the Court held that a state could not impose liability on a defendant alleged to have libeled a public figure unless the defendant acted with actual malice, *i.e.*, with “knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279–80, 84 S. Ct. at 726. In a case concerning a different section of the Fair Campaign Practices Act, the Minnesota Supreme Court noted that the text of that statutory provision (which prohibited a statement “the person knows is false or communicates to others with reckless disregard of whether it is false”) “closely tracks the standard for actual malice” in *New York Times v. Sullivan*. *Abrahamsen v. St. Louis County Sch. Dist.*, 819 N.W.2d 129, 137 (Minn. 2012) (applying Minn. Stat. § 211B.06, subd. 1 (2010)). But the language of [section 211B.02](#) is different from the language of the statute at issue in *Abrahamsen*. There is no textual basis in [section 211B.02](#) for a requirement

that a complainant prove actual malice. There also is no Minnesota authority for imposing such a requirement as a constitutional matter. In *Abrahamson*, the supreme court conducted a statutory analysis, not a constitutional analysis. *Id.* at 137–39. Having concluded that [section 211B.02](#) is not an unconstitutional abridgement of the right to free speech, *see supra* part IV.A., we have no reason to superimpose an actual-malice standard on the statute's requirement of a knowing violation.

### C. Due Process Challenge

[6] Smith last argues that [section 211B.35](#) is unconstitutional on the ground that it does not allow him to conduct discovery, thereby exposing him to a civil penalty without due process. Smith contends that, without discovery, he did not have notice of the evidence against him, which impeded his ability to defend against the city's complaint. A rule of appellate procedure protects the attorney general's right to intervene and defend a Minnesota statute by requiring a party who challenges the constitutionality of a statute to "file and serve on the attorney general notice of that assertion within time to afford an opportunity to intervene." [Minn. R. Civ. App. P. 144](#). If an appellant fails to notify the attorney general of a constitutional challenge, this court deems the constitutional challenge waived. *See Losen v. Allina Health Sys.*, [767 N.W.2d 703, 711](#) (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009). Smith failed to notify the attorney general of this particular constitutional challenge. His statement of the case referred to his constitutional challenge to [section 211B.02](#), but he did not provide notice that he intended to challenge the constitutionality of [section 211B.35](#). Thus, we will not consider the issue.

### V. Karen Smith's Request for Costs

\*9 Karen Smith argues that the hearing panel erred by not granting her request for reimbursement of her costs. She contends that the city should be responsible for her costs on the ground that the city did not have any evidence that she was responsible for the RFTCC's campaign literature such that the complaint against her was frivolous.

The Fair Campaign Practices Act provides that a panel of ALJs may "order the complainant to pay the respondent's reasonable attorney fees" if the panel "determines the complaint is frivolous." [Minn. Stat. § 211B.36, subd. 3](#) (2016). Karen Smith requested reimbursement of her costs in conjunction with her pre-hearing motion to dismiss. The presiding ALJ denied her motion to dismiss at that stage of the proceedings. The presiding ALJ reasoned, "When all of the facts in the City's complaint are considered true, and all inferences drawn [in] its favor, the City has stated a proper claim under [Minn. Stat. § 211B.02](#)." The record supports this reasoning inasmuch as Karen Smith's name was listed among the persons supporting RFTCC's viewpoints and her home address was shown at the bottom of the literature, which was attached to the complaint. We find no fault in the ALJ's reasoning in denying Karen Smith's pre-hearing motion to dismiss. That the hearing panel ultimately dismissed her from the case at the evidentiary hearing, based on a lack of evidence at the conclusion of the city's case, does not mean that the complaint was frivolous. Karen Smith does not argue that the hearing panel erred by denying her motion for reconsideration.

Thus, the hearing panel did not err by not ordering the city to reimburse Karen Smith for her costs.

**Affirmed.**

### All Citations

Not Reported in N.W.2d, 2017 WL 957717

### Footnotes

<sup>1</sup> A home-rule charter outlines a "scheme of municipal government" for a specific municipality. *See Minn. Stat. § 410.07 (2016)*. A home-rule charter recognizes that a city has "unique powers over local matters." *Gadey v. City of Minneapolis*, [517 N.W.2d 344, 348](#) (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). "[I]n all matters pertaining to municipal government the provision of the home rule charter overrides general laws with respect to the same subject. So long as the municipal legislation involves matters of municipal concern and the state has not expressly or impliedly restricted the municipality's power over these matters, the municipality may enact local legislation that is inconsistent with state law." *Id.* (quotation and citation omitted).

- 2 A charter commission is made up of between seven and fifteen qualified voters of the city and is tasked with framing a city charter. [Minn. Stat. §§ 410.05, subd. 1, 410.06 \(2016\)](#). A charter commission may be discharged if a majority of voters vote to discharge the commission. [Minn. Stat. § 410.05, subd. 5](#).
- 3 Smith contends, in part, that a city clerk may not file a complaint under the act because “the only entity with the authority to prosecute, sue, or bring legal action is the city council.” This contention is apparently based on a statute that specifies the powers of a city council in a statutory city, which includes the power to “provide for the prosecution or defense of actions or proceedings at law in which the city may be interested.” See [Minn. Stat. § 412.221, subd. 5 \(2016\)](#). We do not consider the contention because Smith did not preserve it by presenting it to the hearing panel. See [Thiele v. Stich, 425 N.W.2d 580, 582 \(Minn. 1988\)](#).
- 4 The city contends in response that Smith did not preserve this argument by presenting it to the hearing panel. It appears that the city is correct that Smith did not specifically argue to the hearing panel that the city is not an “organization” within the meaning of the statute. Nonetheless, the hearing panel considered the matter and made an express conclusion of law on the issue.

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EXHIBIT 5

OAH 8-0325-33077

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

City of Grant, by and through its City Clerk,  
Kim Points,

Complainant,  
v.

**ORDER ON MOTION  
TO DISMISS AND FOR COSTS  
(THIRD PREHEARING ORDER)**

John D. Smith and Karen Y. Smith,

Respondents.

This matter came before Administrative Law Judge Eric L. Lipman on March 31, 2016, for an oral argument on the Respondents' motion to dismiss and for costs.

Nicholas J. Vivian and Amanda E. Prutzman, Eckberg Lammers, P.C., appeared on behalf of the City of Grant and the City Clerk, Kim Points (City). Richard D. Donohoo, Attorney at Law, appeared on behalf of Respondents John D. Smith and Karen Y. Smith (Respondents or the Smiths).

On December 16, 2015, the City of Grant filed a campaign complaint (Complaint) alleging that the Smiths violated Minn. Stat. § 211B.02 (2014). The complaint maintains that the Smiths misappropriated the City's municipal seal and masthead for use in campaign literature. Moreover, the Complaint asserts that the Smiths' circulation of campaign material with these symbols wrongfully implied that the City endorsed the positions that were advocated in the materials.

At the prehearing conference on January 6, 2016, and in written submissions after that date, the Smiths requested that the complaint be dismissed. The hearing record on the motions closed following the oral argument.

Based upon the submissions of the parties and the contents of the record,

**IT IS HEREBY ORDERED:**

1. The Respondents' Motions to Dismiss and for Costs are **DENIED**.
2. Pursuant to the terms of the Second Prehearing Order in this matter, by **4:30 p.m. on Thursday, May 5, 2016**, each party shall file with the Officer of Administrative Hearings and serve upon the opposing party copies of their witness lists and copies of the pre-

labeled exhibits that it proposes to offer into the hearing record. The City shall label its exhibits sequentially using numbers. The Smiths shall label their exhibits sequentially letters.

3. This matter shall proceed to an evidentiary hearing on **Thursday, May 12, 2016**, at the Saint Paul offices of the Office of Administrative Hearings. The hearing shall begin at **9:30 a.m.**

Dated: April 29, 2016

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ERIC L. LIPMAN  
Administrative Law Judge

## MEMORANDUM

### Factual Background

On October 13, 2015, voters in the City of Grant cast ballots on whether to establish a Home Rule Charter (Question 1) and whether to discharge the City's Charter Commission (Question 2).<sup>1</sup>

The Complaint alleges that, without permission, the Smiths copied the City's municipal seal and masthead and placed these images on three pieces of campaign literature. The literature was circulated during the weeks that led up to the October 13, 2015 special election.<sup>2</sup> The literature included a small font disclaimer that stated that the pieces were "prepared and paid for by the Rally for Charter Committee, 10244-67<sup>th</sup> Ln N Grant MN." This address is the Smiths' home address.

On October 1, 2015, the Rally for the Charter Committee filed a campaign financial report with the City. Respondent John Smith signed the report certifying that it was an accurate accounting of the committee's contributions and disbursements.<sup>3</sup>

The Complaint maintains that Respondents' misappropriation of the City's seal and masthead was deliberate. Kim Points, the City Clerk, asserts that the City Attorney contacted the Smiths on October 5, 2015, and directed them to cease using the City's marks and symbols in this way. The Complaint alleges that, notwithstanding this directive, a second piece of campaign material including the seal and masthead was circulated by the Smiths on October 10, 2015.<sup>4</sup>

<sup>1</sup> COMPLAINT at Exhibit (Ex.) 1; see generally, Minn. Stat. § 410.10, subd. 1 (2014).

<sup>2</sup> COMPLAINT at 2.

<sup>3</sup> City's Response to Respondents' Motion to Dismiss, Affidavit of Kim Points, Ex. A.

<sup>4</sup> *Id.*

The material, allegedly circulated by the Smiths, urged an affirmative vote on Ballot Question 1 and a negative vote on Ballot Question 2.<sup>5</sup>

The Complaint asserts that the unauthorized use of the City's seal and masthead on literature which urged particular votes in the special election falsely implied the City's endorsement of those positions.<sup>6</sup> The City asserts that such a false implication violates Minn. Stat. § 211B.02.<sup>7</sup>

### **The Smiths' Motion to Dismiss**

The Smiths urge dismissal of the Complaint. They make three key arguments in support of dismissal: (a) the underlying statute, Minn. Stat. § 211B.02, is unconstitutional; (b) use of the City's seal and masthead is insufficient to imply that the City endorsed the positions that were urged in the campaign material; and (c) the evidence is insufficient to establish that either John Smith or Karen Smith, prepared or disseminated the campaign material. Each of these claims is addressed, in turn, below.

An Administrative Law Judge may dismiss a Fair Campaign Practices case "where the case or any part thereof has become moot or for other reasons."<sup>8</sup> In considering motions to dismiss in the context of contested cases, the Office of Administrative Hearings has followed the standards developed in the state courts.<sup>9</sup>

When deciding such motions, the tribunal must take the facts that are alleged in the pleading as true and draw all inferences in favor of the non-moving party.<sup>10</sup> A motion to dismiss may be granted only in cases where the moving party demonstrates that the opposing party has no right to relief.<sup>11</sup>

To defeat a motion to dismiss, the non-moving party must show facts that, if true, are sufficient to state a plausible claim for relief. Thus, the question for the tribunal following a motion to dismiss is whether the pleadings state a legal basis to proceed to a hearing.<sup>12</sup> If relief cannot be granted, the matter must be dismissed.<sup>13</sup>

<sup>5</sup> COMPLAINT at Ex. 1.

<sup>6</sup> COMPLAINT at 2.

<sup>7</sup> *Id.*

<sup>8</sup> See Minn. R. 1400.5500 (K) (2015).

<sup>9</sup> Minn. R. 1400.6600 (2015) ("In ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court of Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding").

<sup>10</sup> See *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

<sup>11</sup> *Finn v. Alliance Bank*, 860 N.W.2d 638, 653 (Minn. 2015) (citing cases).

<sup>12</sup> *Northern State Power Co. v. Minnesota Metropolitan Council*, 667 N.W. 2d 501, 506 (Minn. Ct. App. 2003).

<sup>13</sup> See *In re Milk Indirect Purchaser Antitrust Litigation*, 588 N.W.2d 772, 774 (Minn. Ct. App. 1999).

## The Constitutional Claim

The Smiths maintain that the City's complaint must be dismissed because the underlying statute, Minn. Stat. § 211B.02, is unconstitutional. The statute reads:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.<sup>14</sup>

Pointing to the recent decision of the United States Court of Appeals for the Eighth Circuit in *281 Care Committee v. Arneson*,<sup>15</sup> the Smiths contend that section 211B.02 is unconstitutionally overbroad and chills protected political speech. The Smiths maintain that counter-speech is a better, less restrictive means of achieving the government's asserted goal in truthful campaigns.

In *Arneson*, the appellate panel did not squarely address the constitutionality of section 211B.02, or prohibitions of false claims of endorsement. Instead, the panel struck down another section of the Fair Campaign Practices Act, section 211B.06. Section 211B.06 prohibited the dissemination of false claims about "the personal or political character or acts of a candidate, or with respect to the effect of a ballot question . . ." The appellate panel concluded that this statute was infirm because it was not narrowly tailored to meet a compelling interest. As the panel summarized:

[T]he county attorneys have failed to demonstrate that § 211B.06 is either narrowly tailored or necessary to preserve fair and honest elections and prevent a fraud on the electorate. The *mens rea* requirement established in the statute, and any other alleged narrowing safeguards that Appellees claim render this statute constitutional, have little effect in abating the advanced concern of the state. Citing Minnesota law, the county attorneys claim that the legislative intent of § 211B.06 is to prevent corrupt campaign practices that would "mislead the public and permit close elections . . . to be won by fraud." But as we have discussed, the practical application of § 211B.06 only opens the door to more fraud. The statute itself actually opens a Pandora's box to disingenuous politicking itself.

While we would like to agree with the district court that because § 211B.06 employs "the force and impartiality of law," it "serves to check the unfair use of disparate advantage during a campaign," we do not have the luxury of indulging that scenario given the abridgement of core political speech at risk. With such abridgement left unregulated, not only is

<sup>14</sup> Minn. Stat. § 211B.02.

<sup>15</sup> *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014), *cert. denied*, 135 S.Ct. 1550 (2015).

§ 211B.06 not narrowly tailored but likely does not rise to the level of explicating a “compelling” interest. The citizenry, not the government, should be the monitor of falseness in the political arena. Citizens can digest and question writings or broadcasts in favor or against ballot initiatives just as they are equally poised to weigh counterpoints.<sup>16</sup>

The City maintains that Section 211B.02 is constitutional because, unlike Section 211B.06 (2014), it is narrowly tailored to achieve a compelling governmental interest. The City argues that section 211B.06 has a broad scope – proscribing all false statements relating to the effect of a ballot initiative. By contrast, it continues, section 211B.02 prohibits only false claims of individual or organizational endorsement.

Additionally, the City asserts that in a recent unpublished opinion, the Minnesota Court of Appeals upheld section 211B.02 on these grounds. In *Niska v. Clayton*, the appellate panel concluded that preventing confusion within the electorate was a compelling state interest,<sup>17</sup> and that section 211B.02 was narrowly tailored to meet this interest. The panel wrote:

[Section 211B.02] punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization. It prohibits only those statements that can be read as endorsements. The statute therefore prohibits only claims of support and only when those claims are false. So construed, the statute does not prohibit or chill a “substantial amount” of protected speech.<sup>18</sup>

It is important to emphasize that neither an administrative law judge nor an Executive Branch agency has the authority to declare a statute unconstitutional on its face. Such a power is within the exclusive province of the judicial branch.<sup>19</sup>

With that said, however, parties with disputes that are referred to this tribunal sometimes have interests that are protected by the United States or Minnesota constitutions.<sup>20</sup> In such cases, due process of law may require giving effect to those

<sup>16</sup> Arneson, 766 F.3d at 795-96 (quoting *In re Contest of Gen. Election*, 264 N.W.2d 401, 406 (Minn. 1978) (Otis, J., dissenting)).

<sup>17</sup> *Niska v. Clayton*, A13-0622, 2014 WL 902680, at \*7 (Minn. Ct. App.) (unpublished), *review denied* (2014), *cert. denied*, 135 S. Ct. 1399 (2015) (citations omitted).

<sup>18</sup> *Id.* at \* 8.

<sup>19</sup> See, e.g., *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993) (“In this case, however, neither the ALJ nor the Commissioner had the power to declare Minn. Stat. § 144.802 unconstitutional. Thus, the issue could not have been addressed in the proceedings below.”).

<sup>20</sup> See Minn. Stat. § 14.02, subd. 3 (2014) (“Contested case’ means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing”); Minn. Stat. § 14.57 (a) (2014) (“An agency shall initiate a contested case proceeding when one is required by law”).

constitutional guarantees, as applied to the particular circumstances of those cases.<sup>21</sup> Moreover, any determination made by an Administrative Law Judge on these questions is subject to close review and oversight by the state courts.<sup>22</sup>

In this case, the Administrative Law Judge agrees that the overbreadth and under-inclusiveness of section 211B.06, identified in the *Arneson* case, does not extend to section 211B.02. The two statutes aim at different problems, proscribe differing amounts of speech and safeguard very different types of interests.

Section 211B.02 protects a more personal set of interests than section 211B.06. Section 211B.02 forbids the misappropriation of reputation, autonomy and identity for use by others in political campaigns. It guards against a particular type of injury to the person (whether natural or corporate) and these kinds of protections have been a part of our law for a long time.

Indeed, speech-related restrictions are only recognized when they fall within this narrow band of long-standing exceptions to the First Amendment. As Justice Kennedy observed in *United States v. Alvarez*:

[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’ Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; **defamation**; speech integral to criminal conduct; so-called “fighting words;” child pornography; **fraud**; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.<sup>23</sup>

Likewise important, laws prohibiting fraud, perjury or defamation, were in existence when the First Amendment was adopted, and the constitutionality of these limited restrictions are widely-accepted.<sup>24</sup> Similarly, proscriptions that forbid the intentional infliction of emotional distress by means of a false statement, enjoy this same

<sup>21</sup> See generally, *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 241 (Minn. 1984) (“[I]n a pre-enforcement constitutional challenge, the challenge is to the constitutionality of the rule on its face; in a contested enforcement action, the challenge is more to the constitutionality of the rule as applied”); *Pine County v. State Dep’t. of Natural Resources*, 280 N.W.2d 625, 629 (Minn. 1979) (“If … the challenge relates only to the constitutionality of the ordinance, as applied, the aggrieved party must first exhaust available remedies before we will consider the constitutional claims ripe for our review”).

<sup>22</sup> See *id.*; Minn. Stat. § 211B.36, subd. 5 (2014).

<sup>23</sup> *United States v. Alvarez*, -- U.S. --, 132 S. Ct. 2537, 2544 (2012) (emphasis added and citations omitted).

<sup>24</sup> See, e.g., *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government’s power “to protect people against fraud” has “always been recognized in this country and is firmly established”); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (“the constitutionality of perjury statutes is unquestioned”); *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952) (the “prevention and punishment” of libel “have never been thought to raise any Constitutional problem”).

acceptance, notwithstanding the fact that the underlying tort was not recognized until decades after adoption of the First Amendment.<sup>25</sup> In each of these categories, a narrowly-drawn restriction on speech is permitted in order to protect against significant injury to highly personalized interests.<sup>26</sup>

In this case, the City has a substantial interest in maintaining strict neutrality during referenda campaigns and avoiding the appearance that it is supporting particular results from the balloting. There can be significant consequences to a municipality, including financial reporting and litigation, if it uses public resources in support of one side of a ballot question.<sup>27</sup>

Section 211B.02 protects all of those who wish to remain neutral, or silent, from being conscripted against their will into political campaigns. The Administrative Law Judge concludes that Minn. Stat. § 211B.06 is narrowly-tailored to meet a compelling state interest. The statute's restrictions on political speech are constitutional as applied in this circumstance and the decision in *Arneson* does not point to a different conclusion.

### **The Implication Claim**

The Smiths argue that the use of the City's seal and masthead is not enough to imply that the City supported the positions espoused in the materials. They maintain that in *Meinzer v. Jasicki*,<sup>28</sup> an administrative law judge concluded that use of the Brooklyn Park Fire Department's logo on a candidate's brochure, without more, was not enough to imply that the candidate had the endorsement of the fire department. The Smiths argue that, like *Meinzer*, the use of the City's seal and masthead did not imply an endorsement of any particular result in the special election balloting.

In *Meinzer*, the respondent, Mr. Jasicki, was a Brooklyn Park firefighter seeking election to the Brooklyn Park city council.<sup>29</sup> Jasicki disseminated campaign material that identified himself as a 14-year veteran of the Brooklyn Park Fire Department and included an image of the fire department's logo.<sup>30</sup>

For its part, the City contends that the holding in *Meinzer* is sound but inapplicable in this case. It maintains that the facts of this case, and the use it claims the Smiths made of the City's masthead and logo, outdistance the events in *Meinzer*.

<sup>25</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts*, § 12, at 60, and n. 47. (5th ed.1984)

<sup>26</sup> See *Alvarez*, 132 S. Ct. at 2544.

<sup>27</sup> See *Trehus v. City of Lino Lakes*, OAH Docket 48-0325-31026, 2014 WL 2156987 (2014); see also, *Abrahamson v. St. Louis County Sch. Dist.*, 819 N.W.2d 129, 135 (Minn. 2012).

<sup>28</sup> *Meinzer v. Jasicki*, OAH Docket No. 15-6326-17587 (October 20, 2006).

<sup>29</sup> *Id.* at \*2.

<sup>30</sup> *Id.*

The City argues that the three pieces of campaign material were designed to appear as if they were disseminated by the City. Each piece has the image of the City's seal in the top left corner and two pieces have the words "City of Grant, Minnesota" in a large font at the top of the item. Moreover, the City argues that the Smiths continued to use the City's seal and masthead after they were directed by the City to cease using its images in the campaign material.<sup>31</sup>

The Administrative Law Judge concludes that the facts alleged in this matter are different, and more serious, than the claims made in *Meinzer v. Jasicki*. Unlike the firefighter displaying his workplace logo on a campaign flyer, the serial and prominent use of the City's seal and masthead could falsely imply that the City had generated the material and was circulating particular positions on the ballot questions.

The Administrative Law Judge finds the cases of *Daugherty v. Hilary*<sup>32</sup> and *Niska v. Clayton* instructive.

In *Daugherty*, the Minnesota Supreme Court held that Sandra Hilary's distribution of campaign material which reproduced the presentation of the Democrat-Farmer-Labor Party's sample ballot, and recommended a vote for her as Aldermen, falsely implied that her election was endorsed by the DFL party.<sup>33</sup> As in this case, the literature included an official masthead, in a large font at the top, and a disclaimer identifying the true authorship of the item, in a much smaller font at the bottom. As Justice Peterson noted:

[T]he similarity of the Hilary sample ballot to the DFL sample ballot, together with the use of the word 'official' followed by the phrase 'Vote for these DFL'ers,' implied DFL party endorsement. There is no credible reason Hilary can suggest for the particular design of her ballot, except to imply DFL party support or endorsement.... [T]he very vice of the Hilary sample ballot, that 'official' was a consciously chosen word that would attract the voter's attention because of its association with the traditional DFL sample ballot.<sup>34</sup>

Similarly, in *Niska v. Clayton*, a panel of the Minnesota Court of Appeals upheld the finding that a relator's use of the term "Republican Party of Minnesota" on multiple documents, while promoting candidates who lacked the party's endorsement, falsely implied that the Republican Party of Minnesota had endorsed those candidates.<sup>35</sup>

The Administrative Law Judge finds that when the facts in the City's complaint are considered true, and all inferences drawn its favor, the City has stated a proper claim that the Smiths knowingly made a false claim of endorsement.

<sup>31</sup> COMPLAINT at 2; Ex. 2.

<sup>32</sup> *Daugherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984).

<sup>33</sup> *Daugherty*, 344 N.W.2d at 830-31.

<sup>34</sup> *Id.*, at 831-32.

<sup>35</sup> *Niska, supra*, at \*6.

### **The Development and Dissemination Claim**

The Smiths assert that the City has failed to show that they are the real parties in interest. They argue that the fact that their home address is listed on the campaign material as the address for the “Rally for Charter Committee” is not enough to establish that either of the Smiths prepared or disseminated the pieces at issue.

The City asserts that it has put forward sufficient evidence that the campaign material was disseminated by the Smiths, based upon the address included on the materials and Mr. Smith’s filing of related campaign finance reports. Moreover, the City notes that, as an affirmative defense, the burden is on the Smiths to prove they are not real parties in interest.<sup>36</sup>

The Administrative Law Judge agrees. When all of the facts in the City’s complaint are considered true, and all inferences drawn its favor, the City has stated a proper claim under Minn. Stat. § 211B.02.

### **The Smiths’ Motion for Costs**

The Smiths assert that the City’s complaint is frivolous and request the imposition of costs. The Smiths maintain that in light of the decisions in *Arneson* and *Meinzer*, the Complaint is not sufficiently grounded in the law. Additionally, the Smiths criticize the City for waiting more than two months after the special election before filing a Fair Campaign Practices complaint.

The Administrative Law Judge concludes that neither claim is well taken. As noted above, the Complaint sufficiently supports an alleged violation of section 211B.02. Moreover, under Minn. Stat. § 211B.32, subd. 2 (2014), the City had an entire calendar year before filing a complaint with the Office of Administrative Hearings. Accordingly, the Smiths’ motion for costs is denied.

**E. L. L.**

<sup>36</sup> See *BankCherokee v. Insignia Development, LLC*, 779 N.W.2d 896, 902 (Minn. Ct. App. 2010); Minn. R. 1400.7300, subp. 5 (2015) (A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence).

2016 WL 6649006 (Minn.App.) (Appellate Brief)  
 Court of Appeals of Minnesota.

John D. SMITH and Karen Y. Smith, Relators,

v.

CITY OF GRANT, by and through its City Clerk, Kim Points, Respondent.

No. A16-1070.

September 9, 2016.

**Relators's Brief and Addendum**

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## LEGAL ISSUES

John D. Smith and Karen Y. Smith, Relators, v. CITY..., 2016 WL 4649006.

1. Are the Findings of Fact clearly erroneous, not in accord with the evidence and representative of the Office of the Administrative Hearings (OAH) will and not its judgement?

OAH held to the contrary.

2. Was the element “knowledge” as required by [Minn. Stat. § 211B.02](#) stated as a Finding of Fact in the OAH's Findings of Fact, Conclusions of Law, and Order dated June 3, 2016?

OAH did not so state.

3. Does the element “organization” in [Minn. Stat. § 211B.02](#) protect the City of Grant?

OAH held that it did.

4. As a matter of First and Fourteenth Amendment rights, must the City of Grant prove John Smith acted with “actual malice” to support a finding of false claim of support?

\*5 OAH made no finding.

5. If the government is a protected organization under [Minn. Stat. § 211B.02](#), is [Minn. Stat. § 211B.02](#) content neutral or narrowly tailored, and if not does that render the entire statute unconstitutional?

OAH held that it could not decide constitutionality.

6. Does Kim Points lacks standing to bring a complaint on behalf of the City of Grant?

OAH made no finding or conclusion.

7. Did the OAH “evidentiary hearing” attach a civil penalty without due process for discovery and violates the right to due process?

OAH made no finding or conclusion.

7. Is Relator Karen Y. Smith entitled to costs and disbursements pursuant to [Minn. Stat. § 211B.36](#)?

8. OAH made no finding or conclusion.

#### STATEMENT OF CASE

This election campaign complaint was commenced by the City of Grant, “by and through its City Clerk, Kim Points”, alleging violation of [Minn Stat, § 211B.02](#) against John D. Smith and Karen Y. Smith in the Office of Administrative Hearings (“OAH”), OAH 8-0325-33077 on December 16, 2015 (Doc. 1) without approval of the City Council. It was assigned to Administrative Law Judge Eric L. Lipman (Doc. 3). The election itself \*6 was held on October 13, 2015 to determine whether the City of Grant should adopt a city charter and whether the charter commission should be dissolved; the city residents voted to reject the charter and to dissolve the commission. Campaign practice complaints are not treated as contested case hearings and therefore discovery is not allowed. The evidentiary hearing was held on May 12, 2016. The panel consisting of Judge Lipman, presiding Judge, and Administrative Law Judges Ann C. O'Reilly and James E. LaFave. After the City of Grant rested, the panel on motion by the attorney for the Relators and without opposition by the City of Grant dismissed Karen Y. Smith. The panel issued its Findings of Fact, Conclusions of Law and Order

on June 3, 2016 (Doc. 20) ordering Relator John Smith to pay a civil penalty of \$250 for the “negligent and ill-advised” “use of the City's symbols and logo”. Doc. 20 at 7, 10. The scope of judicial review is stated in [Minn. Stat. § 14.69](#):

In a judicial review under sections *14.63* to *14.68*, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

#### **\*7 STATEMENT OF FACTS**

The three paragraph Complaint alleged violations of [Minn. Stat. 211B.02](#) claiming that the Relators Smiths prepared campaign literature utilizing a “proprietary” “City of Gran's seal and masthead” without City permission, thereby implying city endorsement for the charter. Doc. 1 at 2. That Statute states in relevant part that a “person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization.” (Emphasis furnished).

The official City of Grant seal (Doc. 1 is used for official documents as prescribed by [Minn. Stat. 412.201](#). It did not appear on any of the campaign literature. The masthead was not identified or defined by the City and remains unknown. What does appear on the campaign literature is a logo. Various logos appear in the city newsletters. Exs. 3-7. The seal is different from the various logos both in content and usage, a distinction that is known to the City attorney and the City clerk, since one is used for official purposes and the other for promotional purposes. Ex. A, T. 115, 116. The City of Grant does not have any proprietary rights in the logo by virtue of any federal or state registration, city ordinance or city resolution. T. 123-125.

Kim Points, a non-resident, has been appointed City Clerk by the City Council and acted as City Clerk for nine and one-half years. T. 71, 92, 93. Ex. J.

The Relator John D. Smith is a resident of the City, was appointed a member of the Charter Commission and served by default as the treasurer for “Rally for the Charter **\*8** Committee” (Committee). T. 160, 174, 176. Mr. Smith allowed the Committee to use his address since an address for the committee was necessary for campaign disclosure laws. The Committee favored adoption of a city charter. The Committee was loosely organized, without member roster, without officers, quasi-social, held informal meetings and had fluctuating attendance. T. 175, 176. Mr. Smith attended approximately 60 to 75 percent of the Rally for the Charter meetings. T. 210. During the meetings, Committee members would collaboratively discuss ballot-related issues and the development of campaign materials.

Relator Karen Y. Smith played no role and did not participate with the Committee; her only involvement is that of wife of Relator John Smith. T. 184.

In the weeks leading up to the special election, the Rally for the Charter Committee distributed three pieces of campaign literature, all with logos. Doc 20 at 3. The first two were flyers (“Flyers”) on regular paper, Doc 1 at Ex 1, Exs. 9, 11. The third piece was a trifold (“Trifold”). Ex 15. Each piece of campaign material included, as required by [Minn. Stat. 211B.04](#), a disclaimer that stated: “Prepared and paid for by [the] Rally for the Charter Committee, 10244-67th Ln N Grant, MN.” This address is that of Mr. Smith. This disclaimer was seen by all of the City's witnesses who were residents. T. at 19, 35, 60. Flyer

Ellen Gillespie is a resident of the City of Grant and a nearby neighbor of the Relators. On September 27, 2015, she received one of the Flyers, and emailed it to City Clerk Kim Points regarding “using the official City of Grant letterhead” in campaign literature. Doc. 20 at 3. She testified that she knew that that Flyers was not sent from the \*9 City. Tr. 15, 20. She did not know who prepared the Flyers other than the Committee. Tr. 20. She took no further steps and was not involved in any further communications with anyone other than the sending of the email. T. at 21.

Robert Tufty, a resident of the City of Grant, testified that he received a copy of the Flyers, knew that the Flyers were not from the City and that it was prepared by the Committee. Tr. 27, 32, 35. He attended the Charter Commission meetings, attended City council meetings and knew that Relator John Smith was a member of the Commission. TR. 40, 41. He made no contact before the election with city officials, including the City attorney and the City clerk or the Relators, about the Flyers or the Trifold. T. 42-44. He also knew that the City newsletters contained articles pro and con on various issues. T. 45, 51.

None of the witnesses testified as to the identity of the person or persons who prepared the Flyers. Mr. Smith testified that he did not prepare the Flyers and was not involved in the printing of the Flyers. T.177-181, 215.

After receipt of the Gillespie email dated September 27, 2015, Ex. 8, City Clerk Kim Points sent or delivered it to City attorney Mr. Vivian, date unknown. T. 85. She made no effort to contact anyone, including Relator John Smith. T. 95-96, 138-139. She knew John Smith's home address, email address and his phone number, Exs. 7, 10. Trifold

The Trifold prepared by the Committee (Ex. 15) contains printing on both sides, including a space for a mailing address and the mark of a bulk mail postage permit. The item was addressed to “Registered Voters” along mail routes in the City. Doc. 20 at 4. The \*10 brochure contained two different logos. Ex. 15. One logo placed over the pictures had been inserted by the printer. T. 208-209. The logo on the front is the same but smaller than the one used in the 2014 election campaign without objection. Ex. 15 v. Ex. H, T. 207.

The Trifold draft was delivered by Mr. Smith to the printer and then on October 2, 2015 delivered by the printer to the Eagan Post Office Distribution Center for a preaddressing and mail route sorting pursuant to its Every Day Direct program. Doc 20 at 4, T. 166-167. On October 5, 2015, the Eagan Center sent the addressed and sorted trifolds to the White Bear Lake and Stillwater post offices, who then delivered them that week to the residences on the designated routes, which may exclude some residents and include non-residents of Grant due to the overlapping of route numbers and city boundaries. T. 165-167.

Ellen Gillespie did not testify on the Trifold. Robert Tufty did not express any concern about the Trifold to the Mayor, council members or the city attorney. T. 42-44. Tina Labin, a member of the City Council and one of the majority members of the City council in opposition to the charter, did not discuss the Trifold with anyone other than the City Clerk. T. 65, 191-192. She had concluded after reading the Trifold that it was not from the City. T. 60-61. None of them identified the author of the Trifold.

On October 5, 2015, City attorney Mr. Vivian, a non-resident of the City, sent Mr. Smith a letter demanding that Relators refrain from sending out advertisements that included “the City of Grant's seal and masthead” claiming that the “website is copy written and the seal and masthead are proprietary to the City.” Ex. 11. The word copyright \*11 was not used,

there was no reference to a logo and there were not any documentation supporting his claim of proprietary rights. The advertisements attached to the letter were the same as the Flyers, Ex. 9. This letter was sent without the approval or review by the city council, including council member Tina Labin and the City clerk. T. 65, 99. The City clerk did not know why the letter was addressed to Relators John Smith and Karen Smith. T. 98-99. This letter was received by John Smith on October 7 or October 8, 2016, days after the Trifold was being delivered by the United States Post Office. T. 174, 175. This letter was the first time that John Smith was aware of a complaint about campaign material. T. 174, 175.

Although the City Council did not take an official position on the Charter, it was widely known that the majority of the city council were opposed to the Charter and the continuance of the Commission. This majority expressed their opposition in letters and campaign material. T 62-63, 191-192, 210.

Relator Karen Smith was named in the October 5, 2015 letter of attorney Vivian. City Clerk Kim Points did not know that the letter was being sent, did not review the letter, did not know whether the letter was mailed and acknowledged that the date of the letter was one week and one day prior to the election. T. 99-101. Karen Smith was not a member of the Charter Commission, did not attend Charter Commission or City council meetings, played no role in the Rally for the Charter Committee and her name and signature do not appear on the Campaign Financial reports, T. 184. Exs. 10 and 14. During the City's case, not one iota of evidence was offered as to the reasons for her inclusion. She was listed as a witness by the City and was present in the courtroom. Doc. 13, T. 5. The City rested \*12 without calling her and upon Relators' motion to dismiss her, the City offered no objection. T. 171.

## ARGUMENT

### **1. Relators dispute the Findings of Fact as they are clearly erroneous and examination of the hearing record evinces that the decision was representative of the agency's will and not its judgement.**

“An agency acts in a quasi-judicial manner when the commission hears the view of opposing sides presented in the form of written and oral testimony, examines the record and makes findings of fact.” *In re North Metro Harness, Inc.*, 711 N.W.2d 129, 137 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. June 20, 2006). “Contested cases” are protected by the Minnesota Administrative Procedures Act (MAPA). *Minn. Stat. § 14.02, (2014)*. “Contested case” means a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. *Id.* at subd. 3 (2014). Specifically excluded from “contested cases” are “hearings by the Department of Corrections. *Id.*

“On certiorari appeal from a quasi-judicial agency decision not subject to the [Administrative Procedure Act] we examine the record to review questions affecting the jurisdiction of the [agency], the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, \*13 fraudulent, under an erroneous theory of law, or without evidence to support it.”

*Anderson v. Comm'r of Health*, 811 N.W.2d 334, 336 (Minn. App. 2004) (quotation omitted).

Pursuant to *Minn. Stat. § 14.69 (2014)* “The appellant bears the burden of establishing that the agency findings are not supported by the evidence in the record. An agency's decision is arbitrary or capricious if it represents the agency's will and not its judgment.” *In re Rev. of 2005 Adj. of Charges*, 768 N.W.2d 112, 118 (2009) (internal citations omitted).

“A ruling is arbitrary and capricious if an agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.”

*Id.* construing *Citizens advocating Responsible Dev. v. Kandiyohi County Bd.*, 713 N.W.2d 817, 832 (Minn. 2006).

Lastly, generally, courts of appeal review a lower “court’s factual findings for clear error.” *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The Court of Appeals determines “if there is reasonable evidence in the record to support the court’s findings. And when determining whether a finding of fact is clearly erroneous, we view the evidence in the light most favorable to the verdict. To conclude that findings of \*14 fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made. Id. (quotations and citations omitted).

Findings of Fact 1, Doc.20 at 2, states incorrectly that the City logo originated in 1997, relying on the 1997 minutes of the City Council., Ex. 1. These minutes reflect a logo contest, but fails to identify a logo or a resolution adopting a logo or a resolution asserting ownership of the unidentified logo. Exhibit 2 through 6 show different logos. The Mayor in 1997, Mayor Gary Erichson, identified in the City of Grant’s witness list, Doc. 13, could be expected to testify as to the identity of a logo and any claim to the City’s proprietary rights, yet he was not produced by the City. T. 72, 73.

Findings of Facts 6 and 7 refers to an electronic mail messages between John Smith to Kim Points, the City Clerk. Doc. 20 at 2. The Findings incorrectly state that the date of the email is August 30, 2015 and the election date of October 13, 2015. The emails are dated August and September 2014 and relate to the “November 2014 ballot to discharge and disband the Charter Commission.” Ex. 7. T. 91. The ballot question in the email is different than the 2015 ballot question. The City Address list attached to the Exhibit was not used in 2015 as the Rally for the Charter Committee utilized the Every Day Direct program of the United States Postal Service. These Findings then are not only incorrect but irrelevant to the 2015 election.

Findings of Fact 11 and 20 used the word “small” when describing the disclaimer font. Doc 20 at 3, 4. There is no legally required font size, other than the disclaimer must be prominent. Minn Stat. § 211B. 04 (a) (2014).

\*15 Findings of Fact 12, 13 and 14 are not relevant since there is no finding that John Smith prepared the Flyers or arranged for their printing. Doc. 20 at 3. No evidence was produced as to the identity of its preparer, other than it was not John Smith. T. 215. Others on the Committee did so, but not John Smith. Conclusion of Law 8, Doc 2 at 7, acknowledges that “the authorship of the campaign material was dubious and uncertain.” Findings of Fact 15-22, Doc 20 at 4 acknowledged that the Trifold was “circulated by the Committee” and John Smith’s role as taking it to the printer.

There were no Findings of Fact as to whether John Smith knowingly made a statement that was false by use of the advertising materials. As will be discussed in the next section, John Smith was permitted to make the same statement in a prior election.

## **2. The element “knowledge” in Minn. Stat. § 211B.02 was not stated as a Finding of Fact in the OAH’s Findings of Fact, Conclusions of Law, and Order dated June 3, 2016.**

Minn. Stat. § 211B.02 requires knowledge: A person or candidate may not knowingly make, directly or indirectly a false claim ...” The OAH made no Findings of Fact that Relator John Smith knowingly made a false claim. The OAH stated in the Conclusions of Law that there was knowledge, however, it did not include that as a Finding of Fact. Knowledge is a factual issue and not merely one of law. Without a finding of fact as to knowledge, Mr. Smith has not committed a violation of the law.

The City of Grant did not enter evidence as to knowledge when presenting its case. Under Minn. Stat. § 211B.32, the plaintiff bears the burden of proving its case. Defendant \*16 presented a defense to intent by stating the following regarding his knowledge of whether use of a logo implied the City of Grant endorsed a specific position: “Absolutely not. In fact, it had been used in prior election campaigns, and nothing had been said... And I also knew, just from my work experience, there was no indication of any protection of that particular logo, and it had been used

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in many different kinds of ways... We were quite confident that there was going to be no violation of any statute or any federal law."

T. 207-208.

Here the court should reverse the OAH's findings because an essential element of [Minn. Stat. § 211B.02](#) was neither proven nor found.

Knowledge of the statement must be proven with clear and convincing evidence. See [Fine v. Bernstein, 726 N.W.2d 137, 142 \(Minn. Ct. App. 2007\)](#) construing the burden of proof to prove a violation of [Minn. Stat. § 211B.06](#). The OAH record shows that John Smith was a member of the Rally for the Charter Committee, wrote checks on behalf of the committee, and compiled the statements of other people for the tri-fold; but nowhere in the record does it show that he knew that the tri-fold or the flier directly or indirectly stated a false claim that the City of Grant supported the charter. Case law is clear, evidence must be proven as to knowledge.

### **3. The element “organization” in Minn. Stat. § 211 B.02 does not protect a government entity.**

\*[17](#) [Minn. Stat. § 211B.02](#) states a person may not knowingly make, directly or indirectly, a false claim of support by stating or implying that a ballot question has the support of a “political party, party unit, or organization.” The Minnesota State Legislature provided definitions in [Minn. Stat. § 211B.01](#) for the Fair Campaign Practices Act, however, the word “organization” is not defined.

According to the Minnesota Canons of Construction, “words and phrases are construed according to rules of grammar and according to their common and approved usage.” [Minn. Stat. § 645.08 \(1\) \(2015\)](#). Two presumptions of legislative intent are (1) the legislature does not intend a result that is an unreasonable, absurd, or impossible of execution, and (2) “the legislature intends the entire statute to be effective and certain.” [Minn. Stat. § 645.17 \(1\), \(2\) \(2015\)](#). “When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

“(1) the occasion and necessity for the law;

- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.”

\*[18](#) [Minn. Stat. § 645.16 \(2014\)](#).

The word “organization” has the plain definitions of “the act or process of being organized” or “an administrative and functional structure (as a business or political party).” Merriam-Webster, “organization”. Available at:

<http://www.merriam-webster.com/dictionary/organization>. The American Heritage Dictionary provides the following definitions for “organization”

“1.

- a. The act or process of organizing: *The organization of the photos did not take long.*
- b. The state or manner of being organized: *The organization of the files could be improved.*
- c. A manner of accomplishing something in an orderly or efficient way: *Your project was hampered by your lack of organization.*

“2.

- a. A group of persons organized for a particular purpose; an association or business.
- b. The administrative personnel of such a structure: *contacted the organization with his complaint.*”

*American Heritage Dictionary, “Organization.” Available at: <https://ahdictionary.com/word/search.html?q=organization>.* (Emphasis in original).

\*19 [Minn. Stat. § 200.02](#) provides definitions that are to be used in Minnesota Election Law. The legislature defined “municipality” but not “organization.” *See Minn. Stat. § 200.02 subd. 9 (2014)* “Municipality” means any city or town.” The word “city” means a home rule charter or statutory city.” [Minn. Stat. § 200.02 subd. 8](#).

According to a search of the word “organization” in the Revisor’s website, the word “organization” appears 1,849 times in the Minnesota Statutes. The word, “organization” takes many forms in Minnesota Statutes. In [Minn. Stat. § 3.05 \(2014\)](#), “organization” means how the legislature is organized for calling the senate to order. In [Minn. Stat. § 12.25 \(2014\)](#) the counties are directed to form an “organization” for emergency management. The Relators will not list all 1,849 ways that the word “organization” is further used in the statutes.

In [Minn. Stat. § 211B.02 \(2014\)](#), the word “organization” is preceded by the words, “political party,” and “party unit.” Here the legislature clearly intended the word “organization” as it relates to those political entities that are involved in electioneering. In other areas of the Election Law Chapters of the Minnesota Statutes, the legislature contemplated and prohibited the government and public employees from using their public office to influence elections. [Minn. Stat. § 211B.09 \(2014\)](#). A government has the authority to run an election and the legislature codified the organization of how the government runs an election. *See Minn. Ch. 204B (2014)*. If the legislature had contemplated a person or candidate from using speech to imply the support of a government office, it would have prohibited such action as it thought to prohibit a government official from using the color of office to influence an election.

\*20 The former Campaign Practices Act statutes under Minn. Stat. § 210A provided similar language. “No person or candidate shall knowingly, either personally or by any other person, while such candidate is seeking a nomination or election, make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of any major political party, or unit thereof, or of any organization, when in fact the candidate does not have such support or endorsement.” [Minn. Stat. § 210A.02 \(1986\)](#).

Minnesota has legislated fair election laws since 1912. *Minn. Citizens Concerned for Life v. Kelley*, 219 F. Supp. 2d. 1052, 1057 (Dist. Ct. Minn. 2003). The Corrupt Practices Act in the 1913 Minnesota Statutes begins on page 128 and ends on page 141. The Corrupt Practices Act focuses on undue influence through means of force and coercion; does not contain

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the word “organization,” and does not ban false speech. Minn. Stat. § 567 - 631 (1913). More recently, the Minnesota Legislature through bills brought in the house and the senate revisited the Fair Campaign Practices Act in 2016, 2004, 1988, 1975.2016 Minn. Laws Ch. 135, art. 4, § 9; 2004 Minn. Laws 1167; 1988 Minn. Laws 583; 1975 Minn. Laws 764.

The State or the government are not bound as civilians are bound by statute unless the legislature clearly intends the State or government to be bound. [Minn. Stat. § 645.27 \(2014\)](#). In the absence of such a clear intention, the state or its governmental organizations cannot be bound by a statute. Although not on all fours, in *Nichols v. State*, the Minnesota Supreme Court held that [Minn. Stat. § 645.27](#) requires the legislature to specifically name the government as an “organization of any kind” in order for sovereign immunity to be \*21 waived. [Nichols v. State, 858 N.W.2d 773, 777 \(Minn. 2015\)](#). The court specifically stated in *Nichols*:

“Although an expansive definition of ‘organization’ could encompass the State, it could just as easily refer only to business or other nongovernmental entities. That ‘expansiveness’ really has no practical limitation; ‘organization’ could mean any flavor of corporation, association, partnership or...any collection of individuals, small or large, gathered together for a common purpose.”

*Id.*

*See also Holmberg v. Holmberg, 588 N.W.2d 720, 727 (Minn. 1999)* “As the Marriage Dissolution Award of Attorneys Fees statute contains no indication that the legislature meant it to apply to the state, we deny respondents' request for attorney fees.”

“Organization” is a broad term with many different types of applications in the statutes. The legislature has had 40 years to include a government as an organization to be protected under the 211B.02 statute. The legislature's silence evinces its intent for a city or government to not be protected under 211B.02. When the legislature intends to define organization as a government entity, it does that. Here the court should narrowly read organization to exclude government.

**\*22 4. As a matter of First and Fourteenth Amendment rights, the City of Grant must prove John Smith acted with “actual malice” to support a finding of false claim of support.**

The textbook case for when a government official may bring an action regarding a false statement that *could* be implicated to that government official is *New York Times v. Sullivan*.<sup>1</sup> In *New York Times*, the Montgomery Commissioner sued the New York Times over a full page advertisement that stated the police in Alabama used the color of law to oppress black men and women through a “wave of terror.” [New York Times v. Sullivan, 376 U.S. 254, 256 - 258 \(1964\)](#). The question before the court was whether: “this rule of liability, as applied to an action brought by a public official against critics of his conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.” [Id at 268](#).

In a government official's action against a person for making a false statement, *NYT v. Sullivan* has much *dictum* upholding every citizen's right to criticize those who hold office. In, *New York Times v. Sullivan*, the U.S. Supreme Court cited to a string of cases that protect “erroneous statements” and said the “interest of the public...outweighs the interest of the [government official] or any other individual.” [Id at 271 - 272](#), internal citations omitted. The U.S. Supreme Court also said: “[i]njury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual \*23 error.” [Id at 272](#). The U.S. Supreme Court also said government cannot do through a civil law what it cannot do through a criminal law in limiting speech. [Id at 277](#). “A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of liberal judgments...leads to a comparable ‘self-censorship.’” [Id at 279](#).

Thus, the constitutional test governing when a statement is made pertaining to official government conduct, actual malice applies. Actual malice is “knowledge that it was false or reckless disregard of whether it was false or not.” *Id* at 279 - 80.

Under *Sullivan*, factual error in a disparaging remark is protected speech, unless written with a reckless disregard of the truth, in other words actual malice. *New York Times, Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (“If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.”) This protection of speech was guaranteed for criticism of all public officials by the U.S. Supreme Court stating the following:

“Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

‘Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their \*24 governors. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable... . Whatever is added to the field of libel is taken from the field of free debate.’”

*New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272, (1964) quoting *Sweeney v. Patterson*, 76 U.S. App. D. C. 23, 24 (D.C. Cir. 1942)

As recently as 2012, the Minnesota Supreme Court held that actual malice as it relates to election speech in Minnesota requires a defendant to fabricate a statement, produce the statement through imagination, or use an unverified source. *Abrahamson v. St. Louis County School Dist.*, 819 N.W.2d 129, 137 (Minn. 2012) internal citations omitted. Furthermore, “[A] ‘highly slanted perspective ...is not enough to establish actual malice.’” *Id* at 137, internal citations omitted.

The case before the court is extremely analogous to *New York Times v. Sullivan*. Kim Points and the City of Grant have taken a similar position as *Sullivan* as the Montgomery Commissioner. Ms. Points argues that the Rally for the Charter Committee's speech has spoken falsely about the City of Grant by combining otherwise speech Rally \*25 for the Charter would have been free to use with a logo the city once used. In a similar vein, *Sullivan* had argued that an advertisement harmed him as a government official because otherwise free speech included criticism against police officers in the State of Alabama. Here, Ms. Points seeks to use the color of law under 211B.02 to restrict the very first right John Smith has - the right to disagree with government, including the government of the City of Grant.

Here, John Smith's role is analogous of the New York Times in *New York Times v. Sullivan*. The Rally for the Charter Committee took the position to form a city charter, a position that elected and nonelected government official in the City of Grant government opposed. John Smith acted as a conduit to publish statements by compiling other members' statements for the tri-fold, bringing the final product to the printer, and arranging to have the advertisement distributed. John Smith's role was similar to how a newspaper acts as a conduit to publish advertisements.

The record is silent as to whether John Smith acted with actual malice. There is no evidence that John Smith acted more than as a conduit for speech in the tri-fold to be compiled by a committee - at most he had a slanted perspective as a member of the Rally for the Charter Committee - the group of people who created the campaign materials in question. There is no evidence that he fabricated a statement, made an assertion through his own imagination, and worked alone without regards for double checking the speech that flowed through with the tri-fold which would create the false implication that the City endorsed a particular position. As it pertains to the Flyers, testimony at the OAH records evinces John Smith's limited role did not include creating any of the words or images used \*26 in the Flyers. As

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the City of Grant's City Clerk has brought this action on behalf of the City against John Smith and argues that the city is a protected organization under the 211B.02 statute, the City of Grant should be required to prove actual malice.

Taking the analysis one step further, this is no different than a citizen using a City of Saint Paul Police Department badge or logo on a Facebook or LinkedIn page. If the Court of Appeals does not require "actual malice" an ordinary citizen person using a logo found on the internet who disagrees with a city position during an election year could be liable under this statute and could be imposed with criminal penalties. The threat of civil and criminal liabilities would chill speech of dissenters to official government conduct. This is an outcome our founding fathers and the United States Supreme Court did not intend.

**5. If the government is a protected organization under Minn. Stat. § 211 B.02, then Minn. Stat. § 211 B.02 is not content neutral or narrowly tailored, rendering the entire statute unconstitutional.**

"The challenger of the constitutional validity of a statute must meet the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). Ms. Points and the City of Grant seek to restrict the freedom of speech on election issues as it pertains to political speech by entreating the OAH and the courts to permit the City of Grant be a protected organization under Minn. Stat. § 211B.02.

\*27 Laws which restrict political speech must be "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (internal citation omitted).

"The First Amendment of the United States Constitution states: 'Congress shall make no law ... abridging the freedom of speech.' The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment. 'Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people.' It is, particularly, at the heart of the protections of the First Amendment, and is, 'of course, ...at the core of what the First Amendment is designed to protect.' 'Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it.'"

*281 Care Committee v. Arneson*, 766 F.3d 774, 784 (8th Cir. Ct. App. 2014) (internal citations omitted).

Under the plurality opinion of *U.S. v. Alvarez*, the list of content that is unprotected by the First Amendment are the few "historic and traditional categories [of expression] long familiar to the bar." *U.S. v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) quoting *Simon & Schuster, Inv. B. Members of NY. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991). The plurality's list is limited. *Id.* The plurality did not name political speech as content that is unprotected by the First Amendment. There is no mention that accidentally implying the \*28 government has sanctioned a government position is protected speech. While fraud is content that is not neutral, *Id.*, the City of Grant is not alleging that John Smith or the Rally for the Charter committed fraud.

Minn. Stat. § 211B.02 is a content based regulation as it bans the speaker from knowingly making political speech on the content of an implied false claim of support. Here, the City of Grant seeks to ban political speech as it pertains to whether residents of the City of Grant ought to be persuaded regarding a ballot question. There is no evidence that a single voter was misled, or that a single voter believed that the City of Grant supported the charter effort. By seeking be a protected organization under Minn. Stat. § 211B.02, the City of Grant seeks to broaden 211B.02's scope to penalize speech that indirectly implies a government supports a particular position. Application of Minn. Stat. § 211B.02 under this expansive theory renders Minn. Stat. § 211B.02 unconstitutional beyond a reasonable doubt because there is no room for error regarding the indirect implication. This will lead to self-censorship and will have a chilling effect on the speech of the citizenry who seek to use the political process to remedy how their local governments are operated.

Even if there is a compelling governmental interest to ensure voters are not confused by official government positions, the statute is not narrowly tailored to ensure that only direct statements are penalized. Under the former Minn. Stat. § 210A.02 statute, which regulates the same conduct, the Minnesota Supreme Court found that “imply” means “hint” or “suggest” and that those definitions are clear. *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590-1. However, the facts in that case pertained to a private petitioner suing another \*29 private petitioner over the use of the initials, “DFL.” *Id.* At 590. However, the case at hand is not an internal party dispute, it is about the indirect hint that citizens seek to reform the local government. At its core, this case is the dispute of a vocal minority who seek government reform. This group of citizenry is who our fore-fathers sought to protect when drafting the First Amendment.

If this court should find that if [Minn. Stat. § 211B.02](#) may be used to protect government, then it should find that [Minn. Stat. § 211B.02](#) is not narrowly tailored to address a compelling government interest. Any marketing tactic meant to catch the eye of a reader on an advertisement could be read to implicate any number of things depending on the experience and education level of the reader. In this present case, [Minn. Stat. § 211B.02](#) penalizes the author for how a committee's words are interpreted by other people, not by what was intended to be conveyed. The application of censoring government critics in the present case proves beyond a reasonable doubt that [Minn. Stat. § 211B.02](#) as applied is unconstitutional.

#### **6. Kim Points lacks standing to bring a complaint on behalf of the City of Grant.**

Grant is a 4th Class Statutory City and is subject to the 1973 Basic Law of Uniform Code of Municipal Government as it does not have a charter. [Minn. Stat. § 412.015](#) sub. 2 (2014). All cities that do not have a charter are subject to this code pursuant to [Minn. Stat. § 412.016](#) (2014). The clerk of the city is a minute keeper, book keeper, and is required to \*30 provide notice of elections. [Minn. Stat. § 412.151](#) sub. 1 (2014). A clerk is not delegated the authority to bring claims on behalf of a statutory city.

Under Chapter 412, in a statutory city, the only entity with the authority to prosecute, sue, or bring legal action is the city council. [Minn. Stat. 412.221](#) (2015). This statute is under the heading of “City Council” in Minn. Stat. Ch. 412. Had the Minnesota State legislature intended that a clerk have the authority to bring suits, prosecutions, or legal actions on behalf of the city without a city council vote, it would have delegated that authority to the city clerk. Kim Points lacks the authority to bring a claim on behalf of the City of Grant without a city council vote authorizing that action.

#### **7. The OAH “evidentiary hearing” attaches a civil penalty without due process for discovery and violates the right to due process.**

As previously discussed in the first section, “contested cases” are those proceedings where the agency determines the “legal rights, duties, or privileges of specific parties” that are proscribed by law or constitutional right. The U.S. Constitution states no person shall be deprived of property without due process of law. Const. Am. V. The Minnesota State Constitution states “No person shall... be deprived of life, liberty or property without due process of law.” [Const. Minn. Art. 1 § 7](#).

The OAH imposed a civil penalty of \$250 against John Smith as its disposition of the complaint brought against him. [Minn. Stat. § 211B.35](#) details the “Evidentiary Hearing by Panel” procedure at the OAH for violations of [Minn. Stat. § 211B.02](#). [Minn. Stat. § 211B.35](#) (2014). The statute details the deadline, dispositions, and time for dispositions. \*31 Permissible dispositions are, dismissal of the complaint, issuance of a reprimand, finding of a violation, a civil penalty, or referral to the county attorney for prosecution. *Id.* At subd. 2. Under the Minnesota Administrative Rules, only “Contested Case Hearings” receive protections of rights to discovery and rules of evidence to ensure judiciously fair proceedings. *See* Minn. Admin. R. 1400.5010, 1400.6700, 1400.7100, [Minn. Stat. §§ 14.02 subd. 2](#) (2014), [211B.36](#) (2014). There are no rules in the Minnesota Administrative Rules or the Minnesota Administrative Procedures Act detailing rights to discovery or to adequately prepare to challenge a petition in evidentiary hearings.

The procedures detailed in [Minn. Stat. § 211B.35](#) regard when evidence may be taken (subd. 1), when the complaint may be withdrawn (subd. 2), awarding costs (subd. 3), public hearings (subd. 4), and judicial review through the appellate courts (subd. 5), and that proceedings under 211B.32 are not contested cases within the meaning of chapter 14 (subd. 5). [Minn. Stat. § 211B.36 \(2014\)](#).

Mr. Smith does not contend the legislature's delegation of the authority to proceed under the OAH under [Minn. Stat. § 211B.35 subd. 4](#), but the lack of rights to discovery to mount an effective defense in light of the civil penalty.<sup>2</sup> “[T]he legislature may constitutionally abrogate a common law right without providing a reasonable substitute if it is pursuing a permissible, legitimate legislative objective.” *Sartori v. Harnischfeger Corp., et al.*, 432 N.W.2d 448, 453 (Minn. 1988) construing *Silver v. Silver*, 280 U.S. 117, 122 (1927).

Here the legislature's objective was to relieve district courts and county attorneys of the burden of trying frivolous 211A and 211B claims by streamlining the evidence process through the OAH. The legislature both removed the right to discovery to prepare a defense, and authorized the OAH to impose civil penalties if a violation were found. Thus, the legislature removed more than a mere common law right to discovery and created a process where persons can be tried without seeing the evidence to be used against them until inside the evidentiary hearing.

When an “evidentiary hearing” is coupled with a civil penalty up to \$5,000, [Minn. Stat. § 211B.35 \(2014\)](#), the “evidentiary hearing” becomes a “contested case” hearing under [Minn. Stat. § 14.02 subd. 3 \(2014\)](#). Otherwise, a person accused at the OAH of a violation of Minn. Ch. 211A or 211B stands to lose monetary property without seeing the evidence to be used until the day of the hearing. Without the evidentiary rules as protection, and the right to discovery to ensure fair proceedings, the legislature's abrogation creates a due process violation. The amount of money that a respondent stands to lose unconstitutionally is up to \$5,000.

Furthermore, the deadline for filing responsive motions was set by the OAH on January 14, 2016 for February 25, 2016. Doc. 5 and 2. Relators were not permitted to receive evidence or discovery in order to mount a proper defense through a responsive motion. Without receiving the evidence to be used against Relators, their right to mount a \*33 defense, coupled with the civil penalty imposed upon him, amounts to a violation of their right to due process through both the Minnesota and U.S. Constitutions.

Here the legislature removed the rights to discovery for a person subject to an evidentiary hearing. John Smith sought evidence and exhibits to prepare his case for an evidentiary hearing where he faced the threat of a civil penalty<sup>3</sup>. Such evidence he requested to discover were witnesses, what the City of Grant considers it's “seal,” and the evidence the City of Grant held to be used against him.<sup>4</sup> The City's response to the discovery demand under the OAH proceeding was to require John Smith to submit a formal request for release of information under Minn. Stat. Ch. 13. The City basis for its refusal to produce discovery was that the OAH proceeding was an “evidentiary hearing” and that John Smith was not entitled to discovery in an evidentiary hearing. In the end, John Smith did not receive exhibit lists and witness lists until days before the hearing. After the “evidentiary hearing” the OAH imposed a fine.

#### **8. Relator Karen Y. Smith is entitled to costs and disbursements pursuant to [Minn. Stat. § 211B.36](#).**

Minn. Stat. [Minn. Stat. § 211B.36 Subd. 3](#) allows costs, including reasonable attorney fees, for a frivolous complaint. The claim against Relator Karen Y. Smith was frivolous. No evidence was offered by the City as to why City attorney Vivian had addressed his letter to her in the first place. No evidence was introduced as to the reason \*34 for naming Karen Smith in the complaint. The City Clerk knew that only Relator John Smith had executed the campaign financial disclosure forms. Ex. 10, 14.

In the City of Grant's pretrial list of witnesses submitted days before that hearing, Doc. 13, Karen Smith is listed as a witness. She was present in the court room but not called as a witness. The City of Grant did not offer any evidence in connection with the matters described in the Complaint. After the City rested, motion was made to dismiss her without objection by the City. Certainly, this is a case of a frivolous claim. It is especially so since the City is seeking to repress political activity by imposing litigation expenses on the spouse of one who seeks to be a part of the political process, and without any liability on the part of the City.

The panel made no findings concerning this frivolous claim, either at the hearing or in their Findings of Fact and Conclusion of Law. Doc. 20. The panel simply ignored the frivolous nature of this claim and apparently concluded that it was not improper for the City to pursue a totally innocent person without any exposure of liability.

## CONCLUSION

It is respectfully submitted that:

1. The Findings of Fact are clearly erroneous and an examination of the hearing record evinces that the decision was representative of the agency's will and not its judgement;
- \*35 2. The element "knowledge" as required by [Minn. Stat. § 211B.02](#) was not stated as a Finding of Fact in the OAH's Findings of Fact, Conclusions of Law, and Order dated June 3, 2016;
3. The element "organization" in as stated in [Minn. Stat. § 211B.02](#) does not protect a government entity such as the City of Grant;
4. As a matter of First and Fourteenth Amendment rights, the City of Grant did not prove John Smith acted with "actual malice" to support a finding of false claim of support.
5. If the government is a protected organization under [Minn. Stat. § 211B.02](#), then [Minn. Stat. § 211B.02](#) is not content neutral or narrowly tailored, rendering the entire statute unconstitutional.
6. Kim Points lacks standing to bring a complaint on behalf of the City of Grant.
7. The OAH "evidentiary hearing" attaches a civil penalty without due process for discovery and violates the right to due process.
8. Relator Karen Y. Smith is entitled to costs and disbursements pursuant to [Minn. Stat. § 211B.36](#).

The Decision of the Office of Administrative Hearings should be reversed. Relators should be awarded their costs and disbursements.

### Footnotes

- 1 The burden of proof for [Minn. Stat. § 211B.06](#) - false political and campaign material - is clear and convincing evidence. [Minn. Stat. § 211B.02](#) - false claim of support - merely requires preponderance of the evidence as the burden of proof. [Minn. Stat. § 211B.32 subd. 4](#). Libelous statements also require proof of clear and convincing evidence. See: *Jadwin v. Minneapolis Star & Tribune, Co.*, 367 N.W.2d 476, 480 (Minn. 1985) construing *New York Times v. Sullivan*, 376 U.S. 254 (1964).
- 2 In 2007, the Minnesota Court of Appeals held the penalty matrix was not an unlawful expansion of government authority. *Fine v. Bernstein*, 726 N.W.2d 137, 149 (Minn. Ct. App. 2007).
- 3 The OAH uses a penalty matrix where nearly all cases are subject to some form of civil penalty if a violation is found.

4 The city of Grant responded by presenting John Smith a blank piece of paper without the seal impressed into it. Tr. XXX.

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2016 WL 6649007 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

John D. SMITH and Karen Y. Smith, Relators,

v.

CITY OF GRANT, by and through its City Clerk, Kim Points, Respondent.

No. A16-1070.

October 13, 2016.

### Respondent's Brief and Addendum

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#### \*vi STATEMENT OF THE CASE

This matter originates from the City of Grant's ("City") Fair Campaign Practices Act Complaint filed December 16, 2015 alleging Relator John D. Smith violated [Minnesota Statutes section 211B.02](#) by circulating campaign literature that falsely implied the City endorsed certain outcomes in a special election held on October 13, 2015. (Doc. 1.) Specifically, Relator was part of a "Rally for the Charter Committee" which distributed numerous materials, including a flyer and a trifold pamphlet which appropriated the City's official logo, its newsletter logo, and its masthead. In addition, the trifold pamphlet also contained an exact reproduction of the City's Official Sample Ballot but it directed citizens how to vote on the ballot question.

On December 21, 2015, the Office of Administrative Hearings ("OAH") issued a determination of a *prima facie* case. (Doc. 3.) Subsequently, Relator John D. Smith and his wife, Karen Y. Smith <sup>1</sup> filed a motion to dismiss the complaint claiming [section 211B.02](#) is unconstitutional, another case should control, costs should be imposed on the City, and the Smiths are not the real parties in interest. (Doc. 8.) After briefing and a telephonic hearing, the OAH denied Relator's motion. (Doc. 9-11.)

An evidentiary hearing was held pursuant to [section 211B.35](#) on May 12, 2016. Pursuant to agreement at the hearing, the City and Relator submitted written closing arguments. (Doc. 17-18.) On June 3, 2016, the OAH issued written Findings of Fact, Conclusions of Law and Order. The OAH found that Relator violated section 211 B.02 and imposed a \$250.00 penalty. (Doc. 20.) Relator subsequently filed this appeal.

#### \*vii STATEMENT OF FACTS

This Fair Campaign Practices Act dispute arises out of several pieces of campaign literature from the "Rally for the Charter Committee" regarding an upcoming October 13, 2015 special election in the City of Grant ("City").

In 1997, the City of Grant adopted a logo by majority vote of the City Council after a logo contest. (Doc. 13: Ex 1.) The City has used this logo ever since. (Tr. 73, 75.) The City's logo is a round seal with the words "City of Grant" at the top, "A Home in the Country" at the bottom, the dates of incorporation and establishment on the sides, and a log cabin with pine trees at the center (hereinafter "City Logo" or "City's logo"). (See Doc. 13: Ex. 16, Ex. 11 pp. 2-3, Ex 9.) The City's website bears the City's logo and masthead, "The City of Grant", directly at the top of the page. (Doc. 20: Ex. 16.) When the City sends its regular, semi-annual newsletter to residents it emblazons the words "Grant News" across the City Logo (hereinafter "Newsletter Logo"). (Tr. 33-34, 76-78, Doc. 13: Exs. 2-6.) At the evidentiary hearing, all witnesses acknowledged receiving the City's newsletter with the Newsletter Logo.

On or about September 27, 2015, the City Clerk/Administrator, Kim Points, received an email complaint from City resident, Ellen Gillespie, about a flyer she received on her mailbox (hereinafter the "Flyer"). (Doc. 13: Exs. 8, 9.) The Flyer urges voters to vote "Yes" to adopt a proposed home rule charter and "No" to discharge the Charter Commission. (Doc. 13: Ex. 9, Ex. 11, p. 2.) The Flyer features the City Logo and masthead prominently at the top, and contains in fine print at the bottom the words "Prepared and paid for Rally for Charter Committee 10244-67 Ln Grant MN 55082." (Id.) This is the home address of Relator and his wife Karen Y. Smith. (Tr. 163, Doc. 13: Ex. 10, Doc. 15: Ex. 14.) Ms. Gillespie felt the flyer was misleading, "because <sup>\*viii</sup> it looked like the city had sent it." (Tr. 17.) The Flyer was distributed to City residents in their mailboxes or newspaper receptacles. The Flyer is first piece of campaign literature at issue.

The City Clerk/Administrator brought the Flyer to the City Attorney's attention pursuant to the City's policy to investigate all campaign complaints. (Tr. 85.) The City Attorney subsequently mailed a cease and desist letter to Relator and his wife, Karen Y. Smith, on October 5, 2015. (Tr. 85, Doc. 13: Ex. 11.)

The next piece of campaign literature at issue is a glossy, trifold brochure which was mailed to City residents prior to the election (hereinafter the "Trifold"). On or about October 10, City Councilmember Tina Labin received the Trifold in the mail and thought it came from the City and that she had missed a City vote on producing and mailing out this literature. (Tr. 54-55.) The Trifold was originally folded and sealed so that two pages were visible, a front and a back. The front featured the Newsletter Logo in the return address section, the upper left hand corner. (See Doc. 13: Ex. 15.) It was addressed to "Registered Voters" and stated "Reminder! City of Grant Special Election," providing the date, time and polling place. (Id.)

The back of the sealed Trifold contained an exact reproduction of the City's official sample ballot which was taken from the City's publication in the *Pioneer Press*. (Id., Tr. 87, 141, 183, Doc. 13: Exs. 13, 15.) It said "Special Election Ballot, City of Grant, October 13, 2015" at the top and "Sample Ballot" at the bottom. The only difference between the ballot on the Trifold and the ballot the City published was that the Trifold told people to vote Yes on Question I and No on Question 2, whereas the City's Sample Ballot did not indicate how to vote. (See Doc. 13: Exs. 13, 15.)

When the Trifold was opened, the City Logo appeared on one page. (Doc. 13: Ex. 15.) And, not unless and until the recipient opened the Trifold and read the very last line would they <sup>\*ix</sup> see the text "This message prepared and paid for by Rally for the Charter Committee 10244-67th Ln N Grant, MN 55082" in the smallest font on the Trifold. (Id.) Relator hand-delivered the Trifold to the printer, reviewed it and approved it, and ensured the printer mailed it. (Tr. 165, 209.)

Relator testified he was a member of and mailed documents on behalf of the Rally for Charter Committee. (T. 171.) Relator admits distributing Rally for Charter Committee flyers in Grant residents' paper receptacles at their homes for the 2015 special election in question. (Tr. 170, 178, 181.) Relator admits "I may have" distributed the flyers at issue. (Tr. 181, Doc. 13: Exs. 9, 11.) Relator also signed the Rally for the Charter Committee's Campaign Finance Reports, certifying the truthfulness of the contents, and indicating payment for the Flyer and the Trifold. (Tr. 164, Doc 15: Ex. 10, 14.)

**\*1 ARGUMENT**

**1. The OAH's Findings of Fact are supported by Substantial Evidence and were not Arbitrary and Capricious**

**A. Legal Standard**

Fair Campaign Act complaints are governed by Minnesota Statutes Chapter 211B. Specifically, a party aggrieved by a final decision of the Office of Administrative hearings regarding a complaint under 211B, may seek judicial review of the decision pursuant to [sections 14.63 to 14.69. Minn. Stat. § 211B.36, subd. 5](#). The scope of judicial review in this action is provided by [Minnesota Statute section 14.69](#) which provides:

... the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Here, Relator Smith claims eight of the the OAH's Findings of Fact were clearly erroneous and arbitrary and capricious. However, clearly erroneous is not one of the enumerated standards set forth in [Minnesota Statutes section 14.69](#) and the City could find no case applying the clearly erroneous standard to a review under section 211B. It appears Relator claims the eight specific Findings of Fact at issue unsupported by substantial evidence in view of the entire record submitted, as set forth in [section 14.69\(e\)](#), rather than clearly erroneous. Substantial evidence is such relevant evidence as \*2 a reasonable mind might accept as adequate to support a conclusion. *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 215 (Minn.App.1997), review denied (Minn. Dec. 16, 1997).

Relator also claims the OAH's eight findings are arbitrary and capricious. An agency's conclusions are not arbitrary and capricious so long as there is a rational connection between the facts found and the choices made. *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn.2009).

Relator bears the burden of proving that the OAH's entire decision should be vacated based on the eight findings of fact he claims are erroneous. This is a heavy burden. The Court of Appeals will presume the correctness of an agency's decision and defer to an agency's conclusions in its area of expertise. [768 N.W.2d at 119](#). "If there is room for two opinions on a matter, the agency's action is not arbitrary or capricious even though the court may believe that an erroneous conclusion has been reached." *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499 (Minn.App.1993). "The burden of proving that an agency's decision is not supported by substantial evidence is on the relator. If the commission engaged in reasoned decisionmaking, this court will affirm." *In re Class A License Appl. of N. Metro Harness, Inc.*, 711 N.W.2d 129, 137 (Minn. App.2006). "With respect to factual findings made by the agency in its judicial capacity, if the record contains substantial evidence supporting a factual finding, the agency's decision must be affirmed." *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 846 (Minn. 1984). To prevail, Relator must show that the record as a whole lacks

evidence that a reasonable person would accept as adequate support for the OAH's \*3 decision. *Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn. App. 2007). Relator fails to meet this heavy burden.

Relator fails to analyze how the eight findings of fact he appeals out of the 31 total findings of fact render the entire decision of the OAH unsupported by substantial evidence in view of the entire record or make the entire decision arbitrary and capricious. Relator provides no connection between these allegedly incorrect findings and how they impact the OAH's decision to the point of requiring reversal. To the contrary, each of the eight findings is supported by substantial evidence and there is a rational connection between the evidence, the facts, and the decision as a whole.

#### **B. The OAH's Eight Challenged Findings of Fact are Sound and do not Require Reversal of the Entire Decision.**

First, Relator claims that Finding of Fact 1 is incorrect and appears to argue that there is no showing the City has an interest in its logo. However, there is substantial evidence viewing the entire record as a whole that the City consistently uses the same logo, and has since 1997. The City adopted a logo by majority vote of the City Council after a logo contest in 1997. (Doc. 13: Ex. 1.) A resolution was not required as the minutes reflect the City Council voted and the motion passed. The City Administrator/Clerk testified that this is the same logo the City uses today and there has never been any other logo. (Tr. 73, 75.) The City Logo is a round seal, with a log cabin in the middle, the words "City of Grant, Minnesota" at the top, the words "A Home in the Country" at the bottom, and the dates of its municipal organization and incorporation. (Tr. 33, Doc. 13: Ex. 9) When the City sends its regular, semi-annual newsletter to \*4 residents, however, it emblazons the words "Grant News" across the logo. (Tr. 33-34, 77-78, Doc. 13: Exs. 2-6.) The City Logo also appears on the City's website. (Tr. 77-78, Doc. 13: Ex. 16.) There is no evidence in the record that the City uses any other logo. There is no evidence in the record that any other entity uses the City Logo. The evidence shows the City's logo was commissioned, adopted, and has been used regularly for official City correspondence. There is substantial evidence that the logo in the record is the City's logo. There is a rational connection between the evidence and Finding of Fact 1. Therefore, Finding of Fact 1 is not "incorrect" and the OAH's decision is not unsupported by substantial evidence or arbitrary and capricious.

Second, Relator challenges Findings of Fact 6 and 7, pointing out that the Findings state the incorrect date on the email message. While the email message is dated 2014 and related to the 2014 special election, not the 2015 special election, the Findings of Fact are not erroneous. (See Doc. 13: Ex. 7.) The email correspondence and attached City address list evidenced by Exhibit 7 show that Relator knew how to obtain the ballot question wording, because he had done so in the past. Importantly, it also shows that Relator had the addresses of all City of Grant residents who were eligible to vote in the 2015 special election. (See id.) Relator admits distributing Rally for Charter Committee flyers in Grant residents' paper receptacles at their homes for the 2015 special election in question. (Tr. 170, 178, 181). Relator admits "I may have" distributed the flyers at issue. (Tr. 181, Doc. 13: Exs. 9, 11.) Relator focuses on the tri-fold brochure, stating the Post Office delivered that item. (See Doc. 13: Ex. 15.) It is irrelevant whether the Post Office delivered the tri-fold brochure, because Relator did deliver flyers door to door to Grant residents, and \*5 admittedly may have delivered the Flyer at issue in the Complaint. Therefore, there is substantial evidence that Relator had the full list of addresses of Grant voters and delivered the campaign flyers at issue. There is a rational connection between this evidence and Findings of Fact 6 and 7. Relator has not shown that any inaccuracy in these findings undermines the entire decision of the OAH and renders it reversible.

Third, Relator challenges Findings of Fact 11 and 20 because the OAH used the word "small" to describe the font of the disclaimer "Prepared and Paid for by Rally for Charter Committee" which appears at the bottom of the flyers and tri-fold brochure. After viewing the typeface on the exhibits, there is no other reasonable finding that could have been made. The disclaimer language is the smallest size type appearing on any of the campaign materials. The manner in which the City Logo and masthead were used, especially when contrasted with the small typeface of the disclaimer, indicates City endorsement of the ballot question. A person is less likely to view and read the smallest font at the bottom of a document

which reveals the actual source of campaign literature. The OAH's findings are supported by substantial evidence when the entire record is viewed as a whole, and are not arbitrary and capricious.

Fourth, Relator challenges Findings of Fact 12, 13 and 14 claiming they are irrelevant because there was no finding that Relator himself prepared the Flyer or arranged for its printing. These Findings all relate to the Flyer evidenced by Exhibit 9. (See Doc. 13: Ex. 9<sup>2</sup>, Doc. 20.) Namely, that the Rally for the Charter Committee, of \*6 which Relator was a part, distributed the Flyer; That the Flyer contained the City's logo and the City's name in similar typeface and font used on the City's website; And, that a City resident received the Flyer and wrote and wrote to the City Administrator/Clerk about it. The Findings are based upon substantial evidence in the record and there is a rational connection between the evidence and the findings. Specifically, John Smith was part of the Rally for the Charter Committee. (Tr. 160.) He submitted Campaign Financial Reports on behalf of the Rally for the Charter Committee. (Tr. 162-64.) The Rally for the Charter Committee prepared, paid for and distributed the Flyer. (Tr. 164, Doc. 13: Ex. 9.) Relator saw the Flyer on day it was being delivered, he was in support of it, and testified he thought it was "very good." (Tr. 215-16.)

Relator has failed to meet his burden of proving the OAH's decision should be vacated based on these eight findings of fact. He has failed to show that there is not substantial evidence to support the findings. He has failed to explain how the OAH's findings were not based on reasoned decision making. And, Relator has failed to tie these eight allegedly "incorrect" findings to the decision as a whole and explain how the entirety of the decision should be reversed as a result. As set forth in the *In re Review of 2005 Annual Automatic Adjustment of Charges for all Electric & Gas Utilities* matter, the decision is presumed to be correct and relator has failed to rebut the presumption. 768 N.W.2d 112, 119 (Minn.2009). As there is substantial evidence supporting these eight findings and a rational connection between the evidence and the findings, the OAH's decision must be affirmed.

#### **\*7 II. The OAH Properly Found Relator had Knowledge Based Upon the Entirety of the Record Submitted.**

Without citation to authority of any kind, Relator claims the OAH's decision must be reversed because there was no finding of fact that Relator knowingly made a false claim. But, the OAH did conclude as a matter of law that Relator "knowingly made a false claim that the City endorsed approval of Ballot Question 1 and opposed approval of Ballot Question 2." (Doc. 20, Conclusion of Law 7.) There was ample evidence in the record to support this conclusion of law and a rational connection between the evidence and the conclusion.

The OAH panel received evidence of Relator's historical use of the City Logo and masthead in past publications regarding past special elections. Relator admitted distributing other campaign literature door to door by placing them in Grant residents' newspaper receptacles. (Tr. 170.) Some of this literature even bore the City Logo. (Tr. 170-71.). In 2014, Relator requested and received information from the City regarding the 2014 special election, including the specific language of the 2014 ballot question and a list of City resident names and addresses. (Tr. 82-83, Doc. 13: Ex. 7.) Also in 2014, Relator admitted to disseminating the campaign literature containing the Newsletter Logo (the City's regular logo with "Grant News" emblazoned across the middle). (Tr. 188, Doc. 14: Ex. H.) Given that Relator has previously used the City's logos and masthead in campaign literature related to the 2014 special election, it is not surprising he used them knowingly in relation to the 2015 special election.

\*8 The 2015 campaign materials at issue in this action also evidence Relator's knowledge. Relator admits he saw the Flyer when it was being delivered door to door to City residents' newspaper receptacles (Tr. 215, Doc. 13: Ex. 9, Ex. 11 p. 2.) He did not object to the content or form of the Flyer. He did not act to stop the deliveries (Tr. 215-16.) In fact, Relator testified he thought the Flyer was "very good." (Tr. 216.)

Relator admitted he "may have distributed" the three Rally for the Charter Committee flyers attached to trial Exhibit 11. (Tr. 180-81.) The first of these is the Flyer, and appropriates the City's logo and masthead. The second also uses the City's

logo and masthead as well as a prominent heading “City Council Documents.” The third one, incidentally, appropriates the Metropolitan Council's masthead. (Doc. 20: Ex. 11, pp. 2-4.) Tellingly, Relator did not deny distributing these flyers.

Relator admits he looks at the City's website “quite often.” (Tr. 206.) The City's website bears the City Logo and masthead, “The City of Grant”, directly at the top of the page. (Doc. 20: Ex. 16.) Both the City Logo and the masthead are reproduced exactly as they are found on the website on all three flyers. (Doc. 20: Ex. 9, Ex. 11, pp. 2-4.) Relator's admission of accessing the website, his admission he did not object to the Committee distributing the Flyer, and his failure to deny distributing the flyers attached to Exhibit 11 all provide a rational connection between the evidence and the OAH's conclusion.

Relator also acted with knowledge as it relates to the Trifold pamphlet which was mailed to “registered voters” in Grant (Tr. 165, Doc 13: Ex. 15.) The Trifold contains the City's logo twice, once in its original City Logo format and once in the Newsletter Logo \*9 format. (Tr. 214.) First, as to the Newsletter Logo (which was found in the return address area on the front of the pamphlet) Relator admitted the City's regularly mailed official newsletter contains this logo. (Tr. 214.) This admission constitutes knowledge that Newsletter Logo is regularly used by the City in official mailings. Then, Relator admitted he used the Newsletter Logo because he felt what was contained in the Trifold was news (Tr. 216). This admission of the specific purpose of the logo constitutes knowledge under the statute. Also, Relator admitted he specifically put Newsletter Logo on the Trifold as an “attention-getter” because people receive the logo from the City on the newsletter and are familiar with it. (Tr. 135, 206-7, 214.) He testified “particularly in a special election, during off general election year, where you have potentially low turn out, that we needed to draw attention.” (Tr. 206.) Relator used the Newsletter Logo to influence potential voters to vote in the special election.

Second, Relator also admitted knowledge of the use of the City Logo on the Trifold, appearing at the center of four pictures which state at the bottom “Vote YES for the proposed Charter!” (Tr. 184, Doc. 20: Ex. 15.) Relator argues he didn't have the requisite knowledge because he didn't put the City Logo on the Trifold, the printer did. But, that fact is irrelevant because Relator admitted reviewing the City Logo and deciding not to ask the printer to change it because of the costs involved and the short turn-around time to mail the Trifold prior to the election. So, Relator testified he determined “Fine, take it.” (Tr. 209.) Relator's affirmative decision constitutes knowing use of the City's logos on the Trifold.

\*10 Relator knowingly patterned the Trifold after the City's official sample ballot. City Administrator/Clerk Kim Points testified she caused the official sample ballot to be published in the paper, posted at the polling place, and published on the City website. (Tr. 87, 141.) Relator admitted the sample ballot that was reproduced on the Trifold was taken from the publication in the *Pioneer Press*. (Tr. 183.) A comparison of the official sample ballot the City published and the “sample ballot” on the Trifold reveals the language, font, and formatting are identical. (Doc. 13: Exs. 13, 15.).

Relator acted with knowledge because he ensured the Trifold was printed, mailed, and certified the expenditure. Relator admitted he hand-delivered the Trifold to the printer. (Tr. 165.) Relator also admitted ensuring the printer delivered the Trifold to the Post Office for bulk mailing to Grant addresses. (Tr. 165.) And, Relator signed the Campaign Finance Report on behalf of the Rally for the Charter Committee which evidenced disbursements for both the Flyer and the Trifold. (Tr. 164, Doc 15: Ex. 14.)

The City presented all of this evidence at trial. Relator erroneously argues the City must present clear and convincing evidence of his knowledge. The City's burden was not clear and convincing evidence, which applies only when [section 211B.06](#) is at issue. [Minn. Stat. § 211B.36, subd. 4](#). The City met its burden of proving based on a preponderance of the evidence that Relator knowingly made a false claim of City endorsement. [Minn. Stat. § 211B.36, subd. 4](#). The OAH's decision is supported by ample evidence in the record and there is a rational connection between the evidence and the conclusion.

\*11 This matter is similar to *In re Contest of Election in DFL Primary Election Held on Tuesday September 13, 1983*, 344 N.W.2d 826 (Minn. 1984). In that case the Minnesota Supreme Court found the contestee, Sandra Hilary, knowingly violated a statute governing false claim of party support. That statute was section 211B.02's predecessor<sup>3</sup>, section 210A.02, which read:

"No person or candidate shall knowingly, either by himself or by any other person, while such candidate is seeking a nomination or election, make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization, when in fact the candidate does not have such support or endorsement."

Minn. Stat. § 210A.02, repealed by Laws 1988, c. 578, art. 2, S 12, eff. July 1, 1988; *See also Matter of Ryan*, 303 N.W.2d 462, 464 n.1 (Minn. 1981). That statute was similar to section 211B.02 in that it prohibited a person from directly or indirectly making a false claim stating or implying support or endorsement of an organization.

There, Hilary distributed 13,000 sample ballots similar to the one traditionally distributed by the DFL Party, entitled "Official Sample Ballot," with her name and picture on it and the words "Vote for these DFL'ers." Hilary was not endorsed by the DFL.

The Supreme Court noted "[w]hether there has been a false claim of party support or endorsement is a fact issue ascertainable from the documentary evidence before us." 344 N.W.2d at 830. And, the Court concluded "the words may not be construed in \*12 isolation and should be read in the context of the document as a whole." *Id.*

Hilary testified she and her campaign workers did not know the sample ballot falsely implied party support. *Id.* at 831. But, her campaign manager was aware of case law on the subject and chose not to review it. *Id.* Hilary reviewed the previous years' official sample ballot and attempted to create visual dissimilarities between it and hers. *Id.* And finally, Hilary testified she used the sample ballot "because it was a common campaign technique used to influence voters." *Id.* The Supreme Court found, "[h]aving consciously taken the risk that her interpretation of the bounds of the law was not correct, Hilary cannot now claim that she acted without knowledge when we draw the bounds of the law differently." *Id.* And, because Hilary admitted she used a sample ballot because it was a commonly used campaign technique to influence voters, the Court found "the violation was deliberate." *Id.*

Here, Relator also distributed a sample ballot. He testified based on his work experience there was no indication of any protection of the City's logo. (Tr. at 208.) "We had looked at the case law about the use of city logos and seals in campaigns, and we felt quite confident that there was going to be no violation of any statute or any federal law. That was at least my opinion." (*Id.*) Relator testified the City's logo was used in prior election campaigns and "nothing had been said." (*Id.*)<sup>4</sup> And, Relator testified that the \*13 City's logo was placed in the upper left-hand, return address portion of the Tri-Fold Brochure as an attention getter to people in a potentially low turn-out election. (Tr. at 206-07, 214.) Relator testified that people know the logo from the newsletter they receive, and therefore it was placed on the Tri-fold because "people understand it." (Tr. at 207).

So, as in *Matter of Contest of Election in DFL Primary Election Held on Tuesday, Sept. 13, 1983*, Relator consciously took the risk that his interpretation of the bounds of the law was not correct. Relator was aware of the case law. Relator applied his knowledge from his career. Relator used the Newsletter Logo because it would attract attention. Relator chose not to remove the City Logo from the Trifold because of cost and time concerns so that his message would be effective. Relator did not object to distribution of the Flyer and instead thought it was very good. Relator cannot now claim he did not have knowledge that these documents falsely implied City endorsement of the ballot questions. The OAH's decision was based on substantial evidence in the record. And, there is a rational connection between these facts found and the OAH's legal conclusion that Relator acted with knowledge. "With respect to factual findings made by the agency in its judicial capacity, if the record contains substantial evidence supporting a factual finding, the agency's

decision must be affirmed.” *City of Moorhead*, 343 N.W.2d at 846. Relator has failed to meet his burden of proving the agency's decision should be reversed.

**\*14 III. Relator has Waived the Argument that “Organization” in Minn. Stat. § 211B.02 does Apply to the City as he has Raised it for the First Time on Appeal.**

For the first time on appeal, Relator argues the City is not an “organization” entitled to the protections of Minnesota Statutes section 211B.02. Relator did not raise this argument in his motion to dismiss, his opening statement, or his written post-trial memorandum/closing argument. (See Doc. 8, 10, 18, Tr. 7-10.) Because this issue was not litigated below, the issue is waived. “We will not consider issues that have been raised for the first time on appeal.” *N. Am. Water Office v. LTV Steel Min. Co.*, 481 N.W.2d 401, 405 (Minn. Ct. App. 1992); See also *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”). The OAH found that the City is an organization within the meaning of the statute, and Relator has waived any argument to the contrary.

**IV. Whether Relator Acted with “Actual Malice” Is Irrelevant to a Section 211B.02 Analysis and the Issue has been Waived.**

Relator again raises an issue not litigated before the OAH. Relator never argued that violation of the statue requires showing of actual malice. (See Doc. 8, 10, 18, Tr. 7-10.) As such, this issue may not be considered on appeal and has been waived. *N. Am. Water Office*, 481 N.W.2d at 405; *Thiele*, 425 N.W.2d at 582-83.

And, even if not waived, the argument is inapplicable. This is not a libel case. This is not a case brought by an individual government official against critics of his official action. Relator did not make a statement about official government conduct. Relator did \*15 not criticize a public official. Relator did not disagree with the government. It is undisputed that the City of Grant never took an official position on the ballot question. (Tr. 53, 213, Doc. 20 pp. 15.) *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 71011 L.Ed.2d 686, therefore, is inapplicable. Similarly, this is not a case alleging a violation of Minnesota Statutes section 211B.06, whose language does closely track the standard for actual malice. See *Abrahamson v. St. Louis Cty. Sch. Dist.*, 819 N.W.2d 129, 137 (Minn. 2012)(Reviewing a complaint under section 211B.06.). Section 211B.02 does not require a showing that Relator made a statement he “knows is false or communicates to others with reckless disregard of whether it is false.” See Minn. Stat. § 211B.06. It requires only a showing that Relator “knowingly ma[d]e, directly or indirectly, a false claim.” As there is no reckless disregard element in the statute, a complainant under section 211B.02 need not prove actual malice.

**V. Minnesota Statutes section 211B.02 is Constitutional because it is Narrowly Tailored to Serve a Compelling Government Interest.**

Relator argues Minnesota Statutes section 211B.02 is unconstitutional because it is not content neutral and not narrowly tailored. Specifically, he argues that it is not narrowly tailored to ensure that only direct statements are penalized and indirect statements are also penalized. (Rel's Br. p. 28.) Relator argues the statute is overbroad.

A statute's constitutionality is reviewed de novo. *Riley v. Jankowski*, 713 N.W.2d 379, 386 (Minn. Ct. App. 2006). This Court previously considered the constitutionality of section 211B.02 in *Niska v. Clayton*, 2014 WL 902680 (Ct. App. March 10, 2014)(Review denied June 25, 2014), and found the statute to be constitutional. In that \*16 case, this Court found the statute was not unconstitutionally overbroad. *Id.* at \* 8 (Resp.'s Add. at 1.)

Section 211B.02 is not content neutral; it does regulate the content of speech. In order to permissibly regulate the content of speech, the statute must pass strict scrutiny. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813, 120 S.Ct. 1878,

1886, 146 L.Ed.2d 865 (2000); *281 Care Committee v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014). In order to pass strict scrutiny, the statute must be narrowly tailored to serve a compelling government interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010). A narrowly tailored statute advances the government interest in the “least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 2791, 159 L.Ed.2d 690 (2004).

Section 211B.02 regulates a compelling government interest. The state has a compelling interest in preventing electorate confusion and avoiding false speech that misleads the public regarding elections and harm the political process. *Niska*, 2014 WL 902680 at \*7; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, at 344, 349, 115 S.Ct. 1511 at 1517, 1520; *Talley v. California*, 362 U.S. 60, 63-64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960); *Schmitt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979).

And, Section 211B.02 is narrowly tailored to serve that compelling interest. First, it regulates only false statements. False statements are not unprotected, but they have historically received little protection. *Niska*, 2014 WL 902680 at \*7, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 880, 99 L.Ed.2d 41 (1988); \*17 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974). In construing section 211B.02's predecessor, section 210A.02, the Minnesota Supreme Court held regulation of such false speech to be narrowly tailored. “[T]he regulation is directed specifically at false claims of endorsement or support. Thus, it is narrowly drawn to serve a governmental interest in protecting the political process.” *Schmitt*, 275 N.W.2d at 590-91.

This Court previously found 211B.02 “is not unconstitutionally overbroad.” *Niska*, 2014 WL 902680 at \*8. This is because the statute regulates only knowingly false claims of endorsement or support. In *Niska*, the relator also claimed the statute was overbroad because it prohibits factually accurate statements that imply a false endorsement. Relator makes the same implication argument. But, this Court rejected that overbreadth by implication challenge, finding the “statute therefore prohibits only claims of support and only when those claims are false.” *Id.* “By prohibiting only ‘knowingly’ false speech, the statute does not touch on inadvertent falsehoods that contribute to the free expression of ideas.” *Id.*

Relator's citations to *281 Care Committee v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014) are not persuasive. In that case, the Eighth Circuit reviewed section 211B.06, not 211B.02. The Eighth Circuit found section 211B.06 was not narrowly tailored to serve a compelling government interest. But, section 211B.06 has a broader scope than 211B.02. It prohibits all knowingly false statements relating to the effect of a ballot question. In contrast, section 211B.02 prohibits only knowingly false claims of support or \*18 endorsement. Section 211B.02 is more narrowly tailored than 211B.06 and therefore passes strict scrutiny.

Contrary to Relator's argument, the City is not attempting to punish political speech that sways voters. Relator's speech was not about a vocal minority seeking government reform or criticizing their government. Relator's advertisements and his speech would be acceptable if they did not appropriate and reproduce the City's logos and masthead. The City simply cannot have its logos and masthead used in political advertisements in a manner that implies the City endorses a ballot question when it does not. The City has a compelling interest in remaining neutral on ballot initiatives. Relator has failed to provide any instances where true statements that implied a false endorsement would fall within the ambit of the statute. And, Relator has not proposed any less restrictive alternatives which still meet the state's compelling interest. Because this Court has already addressed the constitutionality of section 211B.02 and found it to be narrowly tailored, Relator's argument that the statute is unconstitutional fails.

## VI. The City Administrator/Clerk has Standing to File the Complaint.

The City Administrator/Clerk, Kim Points, has standing to bring the complaint on behalf of the City.

“Minnesota Statutes section 211B.32 (2012), which governs sections 211B.02 and 211B.06, does not restrict who may file an election complaint. It states passively only that ‘[a] complaint alleging a violation must be filed with the office.’ *Minn.*

**Stat. § 211B.32, subd. 1.** It indicates a temporal restriction (“within one year”), id., subd. 2, and a formal restriction (“in writing, submitted under oath, [and factually detailed]”), id. subd. 3. But it says nothing restricting or defining the class of complainants.”

\*19 *Niska*, 2014 WL 902680 \* 3. Accordingly, any person may file a complaint pursuant to **section 211B.32**.

As the City Administrator/Clerk, Ms. Points is the local election official for the City. See **Minn. Stat. § 200.02, subd. 21**. She is charged with duties relating to elections in the city. She is the filing officer responsible for receiving filed campaign finance reports, and is statutorily charged with filing complaints under **section 211B.32** if candidates or committees do not file required reports. **Minn. Stat. § 211A.05, subd. 2**. Ms. Points responded to Mr. Smith's inquiries regarding ballot questions and addresses for City residents (Tr. 81, 83.) Ms. Points posts to the City website (Tr. 78.) Ms. Points compiles the city newsletter (Tr. 75.) Ms. Points received calls about the 2015 special election and flyers that were being distributed. (Tr. 149.) And, Ms. Points drafted the notice informing citizens that the City did not circulate the Rally for the Charter Committee's campaign materials (T. 149.) The City has a policy to investigate all complaints. (Tr. 85.) Pursuant to that policy, Ms. Points forwarded a complaint she received about the Flyer to the City Attorney. (Tr. 85, Doc. 13: Exs. 8, 9, 11.) Her official duties and her actions in this matter place her squarely within the zone of interests protected by the law. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004). And, the plain language of the statute permits Ms. Points the ability to file a complaint. Accordingly, Ms. Points has standing to file the complaint in this matter.

#### **VII. Relator has Waived the Issue of Whether **Section 211B.35** Violates his Constitutional Right to Due Process as it has been Raised for the First Time on Appeal.**

First, Relator did not raise this issue below. Relator never argued that the \*20 procedure violated his constitutional right to due process. (See Doc. 8, 10, 18, Tr. 7-10.) As such, this issue may not be considered on appeal and has been waived. *N. Am. Water Office*, 481 N.W.2d at 405; *Thiele*, 425 N.W.2d at 582-83.

Second, there was no notice to the Attorney General of this constitutional challenge. Relator noticed his constitutional challenge of **section 211B.02** pursuant to the First Amendment to the Attorney General, but has never noticed a constitutional challenge of **section 211B.35** claiming it violates due process. As such, he cannot now raise the constitutional issue:

“At the outset, we must state that plaintiff has failed to give proper notification to the office of the attorney general regarding his intent to challenge the constitutionality of a statute. This is a violation of Rule 144, Rules of Civil Appellate Procedure. Plaintiff presents this constitutional argument for the first time in his brief on this appeal. Where an issue of constitutionality is not raised and acted upon in the court below, a party will not be heard to raise the issue for the first time on appeal to the supreme court.”

*Hampton v. Hampton*, 303 Minn. 500, 501, 229 N.W.2d 139, 140 (1975). Similarly, failure to notify the attorney general waives the issue in the Court of Appeals. “A party is deemed to have waived any such challenge by failing to raise the issue and notify the attorney general in a timely manner.” *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 137 (Minn. 1999) “As a general rule, the Minnesota appellate courts refuse to consider questions of constitutionality when the attorney general has not been notified.” *Swelbar v. Lahti*, 473 N.W.2d 77, 79 (Minn. Ct. App. 1991) citing *Theorin v. Ditec Corp.*, 377 N.W.2d 437, 440 n. 1 (Minn. 1985). Relator has failed to notify the Attorney General as required by \*21 Minn. R. Civ. P. 144. Accordingly, the issue of whether **section 211B.35** violates due process has been waived.

### **VIII. Karen Y. Smith is Not Entitled to Costs pursuant to Minn. Stat. § 211B.36.**

Minnesota Statutes section 211B.36 permits the assigned Administrative Law Judge or the entire panel to order the City to pay respondent's costs or the OAH's costs if the complaint is dismissed. [Minn. Stat. § 211B.36, subd. 3](#). Relator requested costs for Karen Y. Smith in his post-trial memorandum. (Doc. 18.) However, at that time, Karen Y. Smith had already been dismissed from the action pursuant to her motion at trial. (Doc. 20, p. 1, Tr. 171-72.) At that time, Karen Smith moved only for dismissal and failed to make a motion for costs at trial. (Tr. 171-72.) No evidence was introduced of Karen Y. Smith's costs, nor was any evidence introduced which establishes she incurred costs separately or in addition to those incurred by her husband, Relator John D. Smith, in this action. Relator did not and does not have standing to request costs on behalf of Karen Y. Smith.

As Karen Y. Smith was dismissed, she cannot now raise this issue on appeal. She is not a party to this action and the caption has been amended as noted by the OAH in its decision. (Doc. 20, p. 2.) The final order relating to Karen Y. Smith was entered the day she was dismissed, May 12, 2016. Relator had 30 days from this final decision to appeal, or until June 12, 2016. [Minn. Stat. § 211B.36, subd. 5](#); [Minn. Stat. § 14.63](#). She failed to appeal this issue within that time. Accordingly, Karen Y. Smith's time to appeal has elapsed and this issue is untimely.

\*22 But, assuming the issue was raised timely, the evidentiary hearing procedure set forth in sections 211B.31 through 211B.37 does not allow for discovery because it is not a contested case proceeding. [Minn. Stat. § 211B.36, subd. 5](#). Accordingly, the City could not discover whether or to what extent Karen Y. Smith was responsible for the campaign literature at issue in this action. The City named Karen Y. Smith, along with her husband John D. Smith, because their address appeared repeatedly on the required disclaimer on the campaign literature. While Relator executed the Campaign Finance Reports for the Rally for the Charter Committee, this fact does not show Karen Y. Smith was not involved, it simply indicates Relator was. (Doc.13: Ex. 10, Doc. 15: Ex. 14.) During the pendency of the evidentiary hearing, no evidence was elicited which proved Karen Y. Smith's involvement. And, therefore, her motion to be dismissed from the action at the close of the City's case-in-chief was granted without objection by the City.

The City's naming of Karen Y. Smith does not rise to the level of frivolousness. First, the City's complaint survived Relators' Motion to Dismiss and it should not now be subject to sanctions after the evidentiary hearing. The determination as to whether to award sanctions is reviewed under an abuse of discretion standard. See [Collins v. Waconia Dodge, Inc.](#), 793 N.W.2d 142, 145 (Minn. Ct. App. 2011) and [Cole v. Star Tribune](#), 581 N.W.2d 364, 370 (Minn. Ct. App. 1998)(Applying standard to [Minn. R. Civ. P. 11](#) and [Minn. Stat. § 549.21](#).) Relator has failed to analyze how the OAH panel abused its discretion in declining to award sanctions to Karen Y. Smith, and in light of the evidence known to the City at the time of the Complaint and lack of pre-trial discovery procedure in this matter, it did not.

### **\*23 CONCLUSION**

There is substantial evidence supporting the OAH's decision given the entirety of the record. Relator has not met his burden to justify reversal of the OAH's well-reasoned decision. The City of Grant respectfully requests this Court to affirm the OAH's Findings of Fact, Conclusions of Law, and Order.

#### **Footnotes**

- 1 Later dismissed at the close of the City's case-in-chief.
- 2 Also reproduced and found at Doc. 20, Ex. 11, p. 2. Some trial testimony is regarding this second page of Exhibit 11. The second page of Exhibit 11 and Exhibit 9 are the same Flyer.
- 3 [Minn. Stat. § 210A.02](#) was repealed by Laws 1988, c. 578, which also enacted chapters 211A and 211B.

4 Additionally, Relator's use of the City's logo in prior election campaigns without facing a Fair Campaign Act complaint is irrelevant to whether his current actions violate the law. Under well-established principles of law, individuals are presumed to be aware of statutes. *Albrecht v. Sell*, 260 Minn. 566, 569-70, 110 N.W.2d 895, 897 (1961). It is nonsensical to argue that because one has not faced prosecution in the past for an act contrary to the law that they are immune from suit in the future.

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2016 WL 6649008 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

John D. SMITH and Karen Y. Smith, Relators,

v.

CITY OF GRANT, by and through its City Clerk, Kim Points, Respondent.

No. A16-1070.

October 24, 2016.

**Relators's Reply Brief**

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## **\*1 ARGUMENT**

Relator's reply brief is broken into two sections. The first section addresses misstatements of fact presented by Respondent's brief. The second section responds to the constitutional law issues in this matter.

### A.

#### **1. At both the OAH and to this court, Respondent has changed facts as needed to attempt to find a violation of Minn. Stat. § 211B.02 that did not occur.**

The issue based on the facts is that when a petition to the OAH is not supported by the facts, is the Respondent permitted to present irrelevant facts for *any* violation to be found? Respondent does so by restating the Statement of the Case and Facts yet without stating that it is "dissatisfied with the statement of the appellant" [in this case Relators], Rule 128.02, subd. 2 of Mn. Ct. Rules of Civil Appellate Procedure.

Both Respondent's Statements are incorrect. The first paragraph of the Statement of the Case commences with the origination of the Complaint (Doc 1) and "specifically" that the Relator used the "City's official logo, its newsletter logo, and its masthead" and the Official Sample Ballot. Those assertions are not in the Complaint. The Complaint instead complains about the use of a "proprietary," "copy written" [whatever that means] seal and masthead and with the same allegations in the attached letter of the city attorney. There is no mention of any official sample ballot.

\*<sup>2</sup> It became obvious by virtue of Ex. A that the city seal as prescribed by state statutes was not used by Relators. So Respondent's theory then became that it was the city logo. When it then became evident that the claims of "proprietary" and "copy written" could not be met (as there was no resolution or ordinance or legal protection for the use of an undefined logo), those assertions were dropped. Respondent has never explained what it meant by the term "copy written." See Relators Statement of Facts, page 7. Respondent has moved from a proprietary, copy written seal to a logo without legal protection and now to an "official" logo, all without explanation.

But which logo? Exhibits 3-7 each depict a logo that is different from the former. Even one of the panel acknowledge that there were "two different logos being used." T. 216. Even the Trifold (Ex. 15) has two different logos. What logo, if any

of these, was the one referenced in the 1997 minutes, Ex. 1? No evidence was presented as to the logo. The current City of Grant mayor, Gary Erichson, was present at the time of the adoption of the resolution, and he was not called as a witness. Doc.13, 15. Respondent failed to meet its burden of proof to support OAH's Finding of Fact 1, Doc. 20 at 2 as to logo.

What masthead? Respondent bore the burden of proof that John Smith acted knowingly to use the masthead of the City of Grant. Respondent provided no proof of what is constituted as the city masthead, and provided no nexus that John Smith used the masthead of the city of grant. Newsletters submitted into the \*3 court-record under Exhibits 3-5 reveal a different typeface, different words, and different cartoon representations of a logo.

Respondent in its brief does not cite to any evidence that that Relator John Smith crafted a single word of either the flyer or the trifold. Resp. ix. Respondent stated that Relator filing a certificate of the truthfulness of the Campaign Finance Reports is admission to the statements made in the trifold. Id. However, those two documents are very different documents. Respondent had the burden of proof to show Relator knowingly created the message to support a violation of [Minn. Stat. § 211B.02](#).

A violation must also state or imply endorsement by the City of Grant. No statement directly or indirectly states that in the Flyers or Tri-fold. No witnesses of Respondent stated that they thought the campaign documents implied city endorsement but rather conjecture that unidentified others may be confused. Even the voting results would not force that conclusion.

As Respondent has not met this burden of proof, the Relator prays for relief of the underlying petition to be dismissed.

## **2. The OAH's Findings of Fact were not supported by the transcript.**

OAH Finding of Fact 1, Doc. 20, page 2, is unsupported by the transcript. The OAH described a logo, but the 1997 minutes, Ex. 1, does not identify a logo. Also, as explained several times in Relators principal brief and in the OAH record, there is more than one logo/drawing which the city has used for various purposes. \*4 Furthermore, Kim Points, a non-resident, was not even employed by the city for almost 10 years after the contest to determine the unknown logo, T. 71.

Findings of Fact 6 and 7, Doc. 20, pages 2, 3, misinterprets the email about the 2014 ballot question and a taxpayers mailing list sent in early September 2014. The panel must have determined that email related to the 2015 election. But in fact, the email did not. The findings cited as authority Ex. 7, but as explained on page 14 of the Relators Brief, Ex. 7 was written in 2014 and questions the 2014 ballot. This mistaken date may have been occasioned by Respondent's exhibit list, Doc. 13 and 15, stating that the date is 2015. In an attempt to justify these Findings, Respondent stated that Relator knew how to obtain the ballot question wording. However, the wording of the question is irrelevant to the allegation that John Smith violated [Minn. Stat. § 211B.02](#) in 2015.

Respondent states that the 2014 email shows Residents "eligible to vote in the 2015 special election". However, that contention is also irrelevant. John Smith testified that he brought the tri-fold for distribution through the United States Postal Service. Whether or not he had the addresses is moot, as anyone could have delivered to doors - just as political candidates do. The evidence in the record is that John Smith was asked to bring the documents to the U.S. Postal Service, so he did.

Findings of Fact 11 and 20, Doc. 20, pages 3, 4, represents the agency will, not judgement, based upon the facts in the record. The Flyers are not relevant to this discussion since they were prepared by unknown people. The Trifold \*5 disclaimer, the size and location not dictated by Minnesota statutes, is in bold type face, clearly legible and prominent - which is required by Minnesota State Statutes. Moreover, not one witness testified that they were misled or believe that the City was endorsing the Charter.

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Findings of Fact 12, 13 and 14, Doc. 20, page 3, are not relevant. All of the discussion by the Respondents ignore the undisputable fact that Relator John Smith did not prepare the Flyers. The only witness testifying on the identity of the author of the Flyers was Relator John Smith:

Q. (by Judge O'Reilly), Who prepared Exhibit Number 9 (Flyers)?

A. (by John Smith), I'm not certain of that one. I think I mentioned that earlier. I'm not certain. I'm really not certain who prepared that.

Q. Did you ever see it before it went out?

A. Pardon?

Q. Did you ever see it before it went out?

A. I think the earliest I may have seen this -- I know the earliest I saw it was on a day that a group of people delivered these to the newspaper tubes.

Q. So you saw it on the day of delivery.

A. Yes.

Q. So as it was being delivered?

\*6 A. Yes.

Q. You approve it?

A. Do I approve what's on it?

Q. Did you approve it? It has your address and everything on the bottom.

A. Oh, did I -- It wasn't my function to approve each and every piece of literature.

Q. You're in support of it?

A. I wasn't the -- That wasn't -- That wasn't a role that I played. The approval of any document was kind of a group consensus. And whoever may or may have not been at the--at the time when the final draft of any piece was put together, they would have passed it on Okay.

T. 215, 216.

John Smith had testified earlier that he did not prepare the Flyer, did not participate in its preparation, and did not take it to the printer. T. 177. Respondent's claim that John prepared the Flyers intending to imply an endorsement by the City is unsupported by the record.

**3. The OAH made no findings of fact as to Relator's knowledge, therefore, a violation of Minn. Stat. § 211B.02 is unsupported by the record.**

\*7 [Minn. Stat. § 211B.02](#) requires knowledge of a false claim. The panel does not make any such Findings of Fact. The OAH's Conclusion is unsupported. The penalty imposed according to the OAH's penalty matrix shows that Respondent did not meet the burden of proof to show that the Relator's actions were deliberate as required under [Minn. Stat. § 211B.02](#). The OAH imposed penalty that the conduct was "negligent and ill-advised" and not in the matrix of deliberate. Negligent and ill-advised conduct is not knowledge. Therefore, Respondent did not meet its burden of proof to support a violation of [Minn. Stat. § 211B.02](#).

Prior to the trial and based on the Complaint and proposed exhibits, it seemed that Respondent would argue that the letter of city attorney Nicholas Vivian, Ex. 11, would be used as the basis for arguing John Smith's knowledge of use of the logo. That letter did not refer to the logo but rather the seal of the City and some undefined masthead, claiming that they were "copy written" and "proprietary." Given the misleading letter, at the hearing it was apparent, as discussed in Relators Brief, pages 10 and 11, that the letter was received days after the Trifold had been printed. Thus, the letter becomes a non-factor and was after the fact. No person can form intent after the fact.

**4. Kim Points and the City of Grant have not proved that they were voters in the Charter election and thus lack standing to bring a suit. Moreover, Kim Points exceeded her authority as City Clerk by bringing a suit \*8 on behalf of the City of Grant without the explicit direction of the City Council.**

Relator draws the Court's attention to the title of the respondent in this case, "City of Grant by and through City Clerk Kim Points, City Clerk." To reiterate Relator's principle brief, while Kim Points may have standing under Chapter 211B as a private person (her mailing address but not residential address is in the record), she lacks standing as the City Clerk to proceed with an action on behalf of the City wherein the City Council has not directed her to act. Here, Ms. Points and the City Attorney filed a suit without the expressed direction of the City Council through a City Council vote to sue through Ms. Points.

While Respondent's arguments show that Ms. Points performs many duties as a city clerk, they do not cite to where she has the *sua sponte* authority to launch a suit in the name of the City. In this case, Respondent is relying upon her title, not as a private person to grant her standing. The City of Grant's complaint violate statutory requirements of procedure that vest the authority to sue on behalf of the City of Grant to its city council. See [Minn. Stat. § 412.221 subd. 5](#) "The council shall have power to provide for the prosecution of offenses or proceedings at law in which the city may be interested and it may employ counsel for the purpose." But see [Minn. Stat. § 412.151](#) "The clerk shall act as clerk and bookkeeper of the city..." The definition of "clerk" is "a person whose job is to keep track of records and documents for a business or office." Merriam-Webster's Dictionary available at: <http://www.merriam-webster.com/dictionary/clerk>.

\*9 Respondent has the burden to prove that Kim Points has the authority of the city council to bring a suit, or that she is a citizen of the City of Grant, or that she is a voter in the City of Grant in order to have standing in this matter. Respondent has not met this burden. Respondent does not state when the City Council publicly met and voted to bring a suit against one of its citizens. Ms. Points's position is that of clerk, and this filing of a suit in her name as clerk exceeds the scope of any authority vested in her by statute and ordinance.

Respondent details the duties of Kim Point, but those duties do not include the filing of claims. Her five-page job description adopted by the city council, Ex. J, does not list the authority sue as a duty she holds. Given the five-pages of detail in crafting her job description, the City of Grant would have included the duty to file claims if it so desired.

This standing issue is different than Respondent alleges. In [Niska v. Clayton, 2014 WL 902680](#), Court of Appeals, 2014 (see Respondent's Addendum), the Court of Appeals stated that any voter can bring a suit under Minn. Ch. 211B. Respondent has not proven that Kim Points or the City of Grant are voters with the authority to challenge the campaign or election. Here Ms. Points seeks to use color of title to file this complaint on behalf of the city where the city is not a voter. Ms. Points acted *sua sponte* without the authority of the City Council when she filed this complaint on behalf

of the City of Grant. The only remedy that could cure such an abuse of power by Ms. Points and the City of Grant is dismissal of the case against John Smith.

**\*10 5. The Claim against Karen V. Smith is frivolous.**

Respondent's argument that the lack of discovery in this proceeding prevented the City to determine to what extent Karen Y. Smith was responsible, based on the address on the disclaimer in the campaign literature, is frivolous. First of all, Kim Points stated that she lacked knowledge as to why Karen was targeted in the letter from the City Attorney. Secondly, the City attorney and the attorneys in his office must have some knowledge on why she was named, other than the address. Respondent knew in advance of the evidentiary hearing who its witnesses were and what its exhibits would be. Respondent was warned prior to the hearing of the lack of evidence against Ms. Smith by virtue of Relators Motion for Dismissal. During trial, no evidence was produced against Ms. Smith. Respondent made no effort to support the petition they brought against Karen Smith. Respondent further admitted: "During the pendency of the evidentiary hearing, no evidence was elicited which proved Karen Y. Smith's involvement." Respondent Brief, page 22. She was dismissed without objection by Respondent. T. 171, 172. Certainly, the actions of the City Attorney in pursuing her were frivolous. The legislature allowed costs including attorney's fees in such cases and it should be granted here.

Minn. Stat. § 211.B.36 Subd. 3 permits costs for a frivolous complaint, and it does not require nor demand a motion for attorney fees and costs. After dismissal of Ms. Smith, the presiding judge stated that a request for costs could be \*11 made post-hearing and "your objections and concerns certainly are noted for the record." T. 187. Relators renewed their requests for costs in their post-trial submittals. Doc. 18, page 9. Due to the extreme circumstances where the city presented a petition against a party and brought the party to a hearing without producing any evidence, Ms. Smith humbly prays for her attorney fees.

**B.**

At its core, libel is about false statements just as Minn. Stat. § 211 B.02 is about false statements. Similarly, [Minn. Stat. § 211B.06](#) is about campaign speech just as Minn. Stat. § 211 B.06 is about campaign speech. There is no case on point about the mens rea requirement concerning a false statement regarding a government entity. Therefore, Relator relies on case law pertaining to other similar areas of law where First Amendment law, and Due Process law are well established to provide the court guidance.

**1. As a matter of law, Relator was not permitted to raise constitutional questions at the OAH.**

The evidentiary hearing from which this appeal flows is an administrative hearing. *See Minn. Stat. § 211B.32 subd. 1* "Administrative Hearing" (2014). "The Office of Administrative Hearings is an administrative court..." *See MN Office of Administrative Hearings Website*, "About Us" available at [www.mn.gov/oah/about-us/overall](http://www.mn.gov/oah/about-us/overall). State administrative agencies lack "subject matter jurisdiction to decide \*12 constitutional issues because those questions are within the exclusive scope of the judicial branch. *Holmberg v. Holmberg*, 578 N.W.2d 817, 820 (Minn. Ct. App. 1998).

The Minnesota Supreme Court held in 1977 that the proper method of raising constitutional questions is only through the judicial branch - of which the OAH is not a member. Thus, constitutional claims against a statute may not be raised at an administrative agency and may be brought for the first time on appeal. *Neeland v. Clearwater Hospital*, 257 N.W.2d 366, 368 (Minn. 1977). As recently as 2009, the Minnesota Court of Appeals has stated that failure to raise a constitutionality claim at an administrative level is without merit. *See Wilhite v. Scott Cty. Housing and Redevelopment Auth.*, 759 N.W.2d 252, 257 fn. 1 (Minn. Ct. App. 2009).

As a matter of law, even those constitutional issues Relator presented to the OAH were outside of the scope of the OAH's jurisdiction. The Relator could not waive an objection where the tribunal lacks subject matter jurisdiction to hear such an objection. The Minnesota Court of Appeals does have the subject matter jurisdiction to hear constitutional challenges, and as such Relator presented those challenges.

## **2. Statutory interpretation is a question of law reviewed de novo.**

Relator is litigating statutory interpretation of the OAH for several of the words which make up the each of the elements of [Minn. Stat. § 211B.02](#). "Statute **\*13** interpretation is a question of law" which the court of appeals reviews de novo. *State v. Netland*, 742 N.W.2d 207, 217 (Minn. Ct. App. 2007) construing *Munger v. State*, 737 N.W.2d 604, 609 (2007).

Respondent has not provided the court with a single case wherein a City claimed protection as an "organization" under the Fair Campaign Practices Act. As previously discussed in Relator's first brief, Minnesota has regulated Campaign Speech for over 100 years. The present case is unusual as the City claims a protection that has not been litigated by the appellate courts in Minnesota.

From the initial motion to dismiss through the motion for reconsideration, the issues of vagueness, under-inclusiveness, and mens rea have been litigated. As to the constitutional challenges, Relator properly presents them to the Court of Appeals.

## **3. Using the reasoning from the 8th Circuit ruling in 281 Care, Minn. Stat. § 211 B.02 is unconstitutional.**

Respondent argued that there was not a "reckless disregard" standard needed for [Minn. Stat. § 211B.02](#). That is the issue in this case. In *State v. Jude*, 554 N.W.2d 750 (Minn. Ct. App. 1996) the Court of Appeals held that the 1990 version of [Minn. Stat. § 211B.06](#) was unconstitutionally overbroad because the *mens rea* was "reasonably believed" and not "actual malice". *State v. Jude*, at 554 N.W.2d 755.

**\*14** The amended statute of [Minn. Stat. § 211B.06 \(1999\)](#) with "clear and convincing" and "reckless disregard" language was reviewed under 281 Care and still found to be unconstitutional. The 8th Circuit Court of Appeals stated: The risk of chilling otherwise protected speech is not eliminated or lessened by the mens rea requirement because, as we have already noted, a speaker might still be concerned that someone will file a complaint with the OAH, or that they might even ultimately be prosecuted, for a careless false statement or possibly a truthful statement someone deems false, no matter the speaker's veracity...The mens rea requirement in this context does not safeguard the statute's constitutionality nor deter someone from filing a complaint challenging statements involving exaggeration, rhetoric, figurative language, and unfavorable, misleading or illogical statements or opinions. There is nothing in place to realistically stop the potential for abuse of [§ 211B.06](#)'s mechanisms.

[281 Care Committee v. Arneson](#), 766 F.3d 774, 794 (8th Cir. 2014).

The OAH uses a penalty matrix to determine how it will dispose of violations of [Minn. Stat. 211B.02](#). The OAH imposed a fine of \$250 upon Relator. According to the penalty matrix, a fine of \$250 means the 211B violation was either:

1. "Negligent, ill-advised, ill-considered," or,
2. "According to the OAH Penalty Matrix a fine of \$250 is for willfulness that is either: Inadvertent, isolated, promptly corrected, vague statute, accepts responsibility."

\*15 Minnesota Office of Administrative Hearings, Self Help, "Fair Campaign Practices" available at: <https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>.

The OAH panel wrote that it found Smith's conduct as "negligent and ill-advised." *See ALJ's Findings of Fact and Conclusions of Law, and Memorandum* at 10. However, even [Minn. Stat. § 211B.02](#) requires the violation to be performed "knowingly." *See Minn. Stat. § 211B.02 (2014)*. Since the narrower standard in [Minn. Stat. § 211B.06](#) has been found unconstitutional as it pertains to false statements, the broader standard in [Minn. Stat. § 211B.02](#) must also be unconstitutional.

All other cases which have upheld the constitutionality of [Minn. Stat. § 211B.02](#) pertained to statements which implied the endorsement of a political party or other organization - including minor political parties, which is what occurred in *Niska v. Clayton*. However unusual in the present case, Respondent seeks a City to be protected in the word "organization." By extending the definition of "organization" to include government, actual-malice must apply to protect the Freedom of Speech from abuses of the statute, wherein advocates for government reform will not be chilled through an overbroad application of this statute.

#### **4. Actual-malice attaches to this matter because the election is a matter of public concern and the facts allege false speech.**

Case law on libel is appropriate for evaluating statutes that limit false speech because the case law on libel speaks directly to the Free Speech \*16 protections on matters of public concern and false speech. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), a District Attorney was convicted of criminal libel for public statements made about the competency of eight criminal judges in Louisiana. In that case, the United States Supreme Court stated "The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false." *Garrison*, at 78 (1964). In other words, the United States Supreme Court stated that *New York Times* applies when a statute punishes false speech regardless of whether it is a civil or criminal action.

Beyond libel cases, the Minnesota Court of Appeals has also extended the rational of *New York Times* to include false statements of [Minn. Stat. § 211B.06](#). In *State v. Jude*, the Minnesota Court of Appeals used actual-malice and the *New York Times* standard to determine whether a previous version of [Minn. Stat. § 211B.06](#) was unconstitutionally overbroad. *State v. Jude*, 554 N.W.2d 750, 754 (Minn. Ct. App. 1996).

[Minn. Stat. § 211B.02](#) at its core is a criminal statute and the OAH serves as an evidentiary hearing to refer a case for further criminal prosecution by the county attorney. *See Minn. Stat. § 211B.16, and see Minn. Stat. § 211B.19* "A violation of this chapter for which no other penalty is provided is a misdemeanor." The Minnesota Court of Appeals has previously stated,

"the constitutional actual-malice requirement grows out of our 'profound national commitment to the principle that \*17 debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials.'"

*Schlieman v. Gannett MN Broadcasting, Inc.*, 637 N.W.2d 297, 303 (Minn. Ct. App. 2009) quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Respondent relies upon the unpublished *Niska v. Clayton* case for its reasoning that [Minn. Stat. § 211B.02](#) is constitutional. However, the facts in that case and the present case could not be more different. In *Niska*, Bonn Clayton attacked the constitutionality of [Minn. Stat. § 211B.02](#) due to a statement that was found to imply a false claim of support by the Minnesota GOP. In *Clayton*, the Minnesota Court of Appeals stated that if there was an instance where applying

John D. Smith and Karen V. Smith, Relators, v. CITY..., 2018 WL 6549008.

**Minn. Stat. § 211B.02** resulted in an overbroad application of the statute then it would cure the defect in that case. This case is that overbroad application of the **Minn. Stat. § 211B.02**.

Respondent has made no argument to the Court of Appeals that the City should be recognized as an “organization” under **Minn. Stat. § 211B.02**. A search of case law returns no results where a city has claimed such protection under **Minn. Stat. § 211B.02**. In fact, case law previously presented by Relator proves the contrary, when the Legislature intends to bind the state and political subdivisions under the word “organization” it does so. *See Nichols v. State*, 858 N.W.2d 773, 777 (Minn. 2015).

**\*18** Government does not endorse political positions or candidates. *See Minn. Stat. § 211B.09* “An employee or official...of a political subdivision may not use official authority or influence...to take part in political activity” (2014). Beyond the statutory prohibition, there was no testimony at the OAH hearing that any voter was confused. This case will have chilling effect on future speech by citizens who disagree with their elected office. That chilling effect was created by the City of Grant advocating to silence people who disagree with elected leader's positions. If the City of Grant can claim protection, the only way to protect the ordinary citizen's right to Free Speech is by requiring actual-malice.

## CONCLUSION

It is respectfully submitted that the decision of the Office of Administrative Hearing should be reversed, that Relators be awarded costs and disbursements pursuant to Minn. Stat. § 211B. 36 and the Minnesota Rules of Appellate Procedure.

STATE OF MINNESOTA  
 OFFICE OF ADMINISTRATIVE HEARINGS  
 PO Box 64620  
 St. Paul, MN 55164-0620

**COMPLAINT FORM**  
 for Violations of the  
**FAIR CAMPAIGN PRACTICES ACT or**  
**CAMPAIGN FINANCE ACT**

**Information about complaint filer (Complainant)**

Name of Complaint Filer <i>BARBARA LINERT</i>	STEVEN J. TIMMER		
Address <i>4282 BRADDOCK TRAIL</i>	<i>5348 OAKLAWN AVE</i>		
City, State, Zip <i>EAGAN MN 55123</i>	<i>EDINA MN 55424</i>	Daytime Telephone Number <i>651-249-9297</i>	STEVEN <i>952-607-7734</i>
Email Address <i>barbara.linert@gmail.com</i>	<i>stimmer@planetlawyers.com</i>	Fax Number <i>651-456-5777</i>	

**Identify person/entity you are complaining about (Respondent)**

Name of person/entity being complained about <i>MICHELLE L. MACDONALD</i>	
Address <i>1069 SOUTH ROBERT STREET</i>	
City, state, zip <i>WEST SAINT PAUL MN 55118</i>	Daytime telephone no. <i>612-544-0932</i>
Fax no.	E-mail address <i>michelle@maccdonaldlawfirm.com</i>

Provide the specific statute in Minnesota Statutes Chapter 211A (Campaign Finances Act) or Chapter 211B (Fair Campaign Practices Act) that you allege has been violated:

Minn. Stat. 211B.02 (2016)

Chapters 211A and 211B are available online at  
<https://www.revisor.leg.state.mn.us/statutes/?id=211A>  
<https://www.revisor.leg.state.mn.us/statutes/?id=211B>

Date(s) of violation(s): October 19, 2016

Date of election or ballot question: November 8, 2016

Elected office or ballot question involved: Supreme Court Justice

If allowed by law, do you wish to request an expedited probable cause hearing within 3 business days? yes :

### **Nature of Complaint**

Explain in detail why you believe the respondent has violated Minnesota Statutes Chapters 211A or 211B. Attach an extra sheet of paper if necessary. Attach copies of any documents that support your allegations.

This complaint must be dismissed by the Administrative Law Judge if this submission does not show a *prima facie* violation of the statutes. "*Prima facie*" means that the facts you present must be sufficient to show a violation.

See attached

## Oath:

I, \_\_\_\_\_, under penalty of perjury, swear or affirm that the statements I have made in this complaint are true and correct to the best of my knowledge.

Signature of person filing complaint  
(Sign in front of Notary Public)

Date \_\_\_\_\_

## FILING INSTRUCTIONS

Send completed form and check for \$50 filing fee made payable to: Office of Administrative Hearings. If you are financially unable to pay the filing fee, you may submit an *in forma pauperis* affidavit (available at <https://mn.gov/oah/forms-and-filing/forms/index.jsp>) instead.

Complaints may be submitted to the Office of Administrative Hearings by personal delivery, U.S. mail or fax (651-539-0310). Complaints are not deemed filed until both the complaint form and filing fee are received at the Office of Administrative Hearings. Because the Office of Administrative Hearings closes at 4:30 p.m., any filings received after that time will be deemed received the following business day.

If you have questions call an OAH staff attorney at 651-361-7900.

This document is available in alternative formats to individuals with disabilities by calling 651-361-7875. For TTY/TDD communication contact us at 651-361-7878.

## LEGAL RESOURCES

Minn. Stat. § 211B.33, subd. 1 and 2 (prima facie review) provides as follows:

**Subdivision 1. Time for Review.** The chief administrative law judge must randomly assign an administrative law judge to review the complaint. Within one business day after the complaint was filed with the office, when practicable, but never longer than three business days, the administrative law judge must make a preliminary determination for its disposition.

**Subd. 2. Recommendation.**

(a) If the administrative law judge determines that the complaint does not set forth a prima facie violation of chapter 211A or 211B, the administrative law judge must dismiss the complaint.

(b) If the administrative law judge determines that the complaint sets forth a prima facie violation of section 211B.06 and was filed within 60 days before the primary or special election or within 90 days before the general election to which the complaint relates, the administrative law judge must conduct an expedited probable cause hearing under section 211B.34.

(c) If the administrative law judge determines that the complaint sets forth a prima facie violation of a provision of chapter 211A or 211B, other than section 211B.06, and that the complaint was filed within 60 days before the primary or special election or within 90 days before the general election to which the complaint relates, the administrative law judge, on request of any party, must conduct an expedited probable cause hearing under section 211B.34.

(d) If the administrative law judge determines that the complaint sets forth a prima facie violation of chapter 211A or 211B, and was filed more than 60 days before the primary or special election or more than 90 days before the general election to which the complaint relates, the administrative law judge must schedule an evidentiary hearing under section 211B.35.

**TENNESSEN WARNING**

The data requested in this form will be used for the purpose of carrying out the responsibilities of the Office of Administrative Hearings in the complaint process established by Minn. Stat. § 211B.31-.37. The information requested is needed to initiate the proceeding, provide required notice to other parties or persons and conduct the required review and hearing. Failure to provide the requested information can result in the Complaint being rejected as incomplete, delayed in processing and/or dismissed as failing to set forth a *prima facie* violation.

The law governing this process makes all records relating to the hearing, including this Complaint, open to the public. If you believe that any data you are submitting is not public under law, you must identify which data is protected and why it is not public data under the Minnesota Government Data Practices Act.

State of Minnesota  
Office of Administrative Hearings  
PO Box 64620  
St. Paul, MN 55164-0620

Docket No. \_\_\_\_\_

**Complaint for violation of the Fair Campaign Practices Act  
Minn. Stat. § 211B.02 (2016)**

For their complaint, the Complainants Barbara J. Linert and Steven J. Timmer state:

1. Both Complainants are residents and registered voters in Minnesota. Barbara J. Linert resides at 4282 Braddock Trail, Eagan, Minnesota 55123; Steven J. Timmer resides at 5348 Oaklawn Avenue, Edina, Minnesota 55424.
2. Respondent Michelle L. MacDonald is a Minnesota attorney with an office at 1069 South Robert Street, West St Paul, Minnesota 55118. Ms. MacDonald is a candidate for the Minnesota Supreme Court, challenging the incumbent Justice Natalie Hudson. The election will be held on November 8, 2016.
3. On or before October 19, 2016, Ms. MacDonald caused to be published a candidate profile of herself in a "Voter Guide" section of the website of the Star Tribune newspaper, the largest circulation daily newspaper in Minnesota. Ms. MacDonald supplied the information that was in the candidate profile.
4. This is the Endorsements section of the candidate profile:

**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

5. Ms. McDonald was endorsed by the Republican Party of Minnesota in 2014. She sought the party's endorsement in 2016 as well. But the convention body refused to endorse her.

6. In an effort to show continuing support by the Republican Party of Minnesota, Ms. MacDonald claimed to be endorsed by the "GOP's Judicial Selection Committee [in] 2016."
7. In point of fact, there was no "Judicial Selection Committee" under the then-operative constitution of the Republican Party of Minnesota. There was a "judicial election committee," referred to in lower case in the constitution, the function of which was to screen judicial candidates, and if they met the qualification for the position sought, pass them on to the convention for consideration of an actual endorsement. This committee had no power of endorsement on its own.
8. The recommendation of the committee of Michelle MacDonald to the convention was contentious, with a minority report issued by the committee recommending *against* endorsement. And, as stated earlier, the convention refused to endorse her. Ms. MacDonald was at the convention, and these things are known to her, as amplified in paragraph 11.
9. The judicial election committee functioned as a nominations or screening committee. The constitution of the RPM has been amended to provide that in the future judicial candidates will pass through the same nominations committee as candidates for every other office seeking endorsement.
10. It was highly misleading and deceptive of Ms. MacDonald to claim the endorsement of a committee that did not exist, and to fundamentally misstate what the real committee did. The prospect for deceiving and misleading voters is obvious. The references to "Republican" and "GOP" were intended – also obviously – to cause voters to think that she had continuing Republican Party support, which she does not.
11. In remarks subsequent to the non-endorsement decision, Respondent MacDonald acknowledged that she was not endorsed by the convention or the judicial election committee:

Michelle MacDonald: "I am not Republican endorsed this year"

• Time 7:13: "The Republican Party decided not to endorse judges, not specifically me, but that was the undertone...[cross-talk]...I am not Republican endorsed this year."

[Source: Fletcher Long Interview with Michelle MacDonald, "The Long Version", October 5, 2016, accessed via podcast on October 23, 2016. Link: <http://longversionw4j.com/podcasts/>]

Michelle MacDonald acknowledged committee only "recommend[ed] her for endorsement":

- Time 3:35: "But ultimately, after my interview, and after I submitted all kinds of papers, this entire committee said 'we are going to recommend her for endorsement."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with MacDonald on May 21, 2016

Michelle MacDonald: "I still have the support of the true Republican Party":

- Time 7:52: "Well, I'm still running for Minnesota Supreme Court. I still have the support of the true Republican Party, which are not necessarily the delegates, which I would have gotten support of if I had been able to speak. But the people, the people of Minnesota who elect the delegates."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with MacDonald on May 21, 2016. Link: <http://alphanewsmn.com/delegates-mngop-convention-choose-no-endorsement-michelle-macdonald/>]

Here, Respondent MacDonald acknowledges that she wasn't endorsed by the convention. She also acknowledges that the [judicial election] "committee" did not endorse her. Further, she states that she had the support of the "entire committee," when we know, because of the minority report of the judicial election committee, she did not.

12. Your Complainants assert that claiming endorsement by the fictitious "Judicial Selection Committee" is a knowing and intentional violation of Minn. Stat. § 211B.02 (2016), captioned FALSE CLAIM OF SUPPORT, which states as follows:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization [e.g., a BPOU]. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

13. This case is on all fours with an earlier decision of the Office of Administrative Hearings, affirmed as to the § 211B.02 claim, in *Niska v. Clayton*, No. A13-0622 (Minn. Ct. App. Mar. 10, 2014). In that case, the Respondent Clayton made claims about the endorsement of Supreme Court challengers by a group called the Judicial District Republican Chairs Committee, a group that also lacked the power of party endorsement. In affirming the OAH's finding of a violation of the false claim of endorsement statute, the Court of Appeals wrote, in Section III of its opinion:

Clayton's next argument is that the panel did not receive substantial evidence that he violated section 211B.02. He appears to assert that the ALJ panel erred by concluding that his actions constituted a false endorsement. A person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party. See *In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms "DFL" and "LABOR ENDORSED" on campaign materials violated the statute); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979) (finding the use of the initials "DFL" would falsely imply endorsement or support). Clayton used the term "Republican Party of Minnesota" on multiple documents and on his website while promoting candidates who lacked the party's endorsement. Clayton attended the state Republican convention and knew that the party had not endorsed his preferred candidates. The ALJ panel had ample evidentiary support for its finding that his actions knowingly and falsely implied that the RPM endorsed the candidates.

14. Apparently, in the last day or two, the claim of endorsement by the GOP Judicial Selection Committee was removed by editors of the newspaper:

election.startribune.com

≡ **StarTribune**

wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

**Endorsements:**

- Christians United In Politics
- Republican Party of MN 2014
- 

**More Information:** Candidate website

*The information on this page was provided by the candidate.*

The "bullet" where the claim was remains.

15. In addition to whatever monetary penalty the OAH imposes, your Complainants request the OAH to declare Respondent MacDonald's claim of endorsement of the fictitious "GOP Judicial

Selection Committee" or the real judicial election committee to be false and misleading, whether published in the Star Tribune, or written or communicated anywhere else.

16. Because the election is just two weeks away, this case must be heard and decided on an expedited basis. We request a telephone *prima facie* hearing, with a plenary hearing to be set as soon thereafter as possible.

Date: October 24, 2016

Signed and offered under penalty of perjury.

Barbara Linert  
Barbara J. Linert

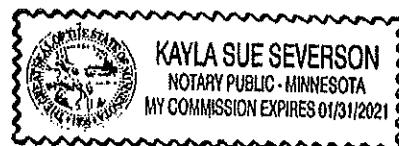
/s/ Steven J. Timmer

Steven J. Timmer

Acknowledged before me:

Kayla S. Severson

Date: 10/25/16





OAH Docket Number: \_\_\_\_\_

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara J. Linert & Steven J. Timmer

V.

Michelle L. MacDonald

**NOTICE OF APPEARANCE**

**PLEASE TAKE NOTICE that:**

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.
2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**
3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

**Complainant: Steven J. Timmer**

Email: [stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com) Telephone: 952-607-7734

Mailing Address: 5348 Oaklawn Avenue, Edina, MN 55424-1309

**Complainant: Barbara J. Linert**

Email: [barbaralinert@gmail.com](mailto:barbaralinert@gmail.com) Telephone: 651-456-5777

Mailing Address: 4282 Braddock Trail, Eagan, MN 55123

**Respondent's Name: Michelle L. MacDonald**

Email: [michelle@macdonaldlawfirm.com](mailto:michelle@macdonaldlawfirm.com) Telephone: 612-544-0932

Mailing Address: 1069 South Robert Street, West St. Paul, MN 55118

Date: October 24, 2016

  
Barbara J. Linert, Complainant

Note: This form must be served upon the opposing party/agency. Counsel may not withdraw from representation without written notice.



# RECEIVED

By: OAH on 10/25/2016 at 2:27 PM

OAH Docket Number: \_\_\_\_\_

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara J. Linert & Steven J. Timmer  
v.  
Michelle L. MacDonald

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Email: [michelle@macdonaldlawfirm.com](mailto:michelle@macdonaldlawfirm.com) Telephone: 612-544-0932

Mailing Address: 1069 South Robert Street, West St. Paul, MN 55118

Date: October 24, 2016

A handwritten signature in black ink, appearing to read 'Steve J. Timmer'. It is written in a cursive, flowing style with a signature line underneath.

Steven J. Timmer, Complainant

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State of Minnesota  
Office of Administrative Hearings  
PO Box 64620  
St. Paul, MN 55164-0620

Docket No. \_\_\_\_\_

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5. Ms. McDonald was endorsed by the Republican Party of Minnesota in 2014. She sought the party's endorsement in 2016 as well. But the convention body refused to endorse her.

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7. In point of fact, there was no "Judicial Selection Committee" under the then-operative constitution of the Republican Party of Minnesota. There was a "Judicial election committee," referred to in lower case in the constitution, the function of which was to screen judicial candidates, and if they met the qualification for the position sought, pass them on to the convention for consideration of an actual endorsement. This committee had no power of endorsement on its own.

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election.startribune.com

☰      **StarTribune**

wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- 

**More information:** Candidate website

*The information on this page was provided by the candidate.*

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15. In addition to whatever monetary penalty the OAH imposes, your Complainants request the OAH to declare Respondent MacDonald's claim of endorsement of the fictitious "GOP Judicial

Selection Committee" or the real judicial election committee to be false and misleading, whether published in the Star Tribune, *or written or communicated anywhere else.*

16. Because the election is just two weeks away, this case must be heard and decided on an expedited basis. We request a telephone *prima facie* hearing, with a plenary hearing to be set as soon thereafter as possible.

Date: October 24, 2016

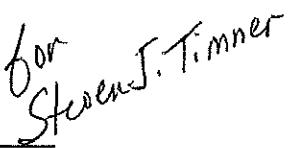
Signed and offered under penalty of perjury.

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Barbara J. Linert

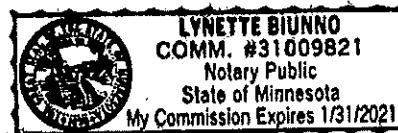
  
Steven J. Timmer

Acknowledged before me:

 - for 

Date:

Oct. 25 2016





October 26, 2016

Michelle MacDonald  
1069 S Robert St  
W St Paul, MN 55118

Re: *In the Matter of Barbara Linert and Steven Timmer v.  
Michelle MacDonald*  
OAH 71-0320-33929

Dear Ms. MacDonald:

The enclosed Fair Campaign Practices complaint (Complaint) was filed with the Office of Administrative Hearings on October 25, 2016. The Complaint alleges you violated Minn. Stat. § 211B.02 (2016) (false claim of support) in connection with your campaign for election to the Minnesota Supreme Court.

The matter has been assigned for review to Administrative Law Judge Jessica A. Palmer-Denig. Within three business days, the Administrative Law Judge will make a preliminary determination of whether the complaint constitutes a *prima facie* violation of Minn. Stat. chs. 211A or 211B (2016). “*Prima facie*” means that the facts alleged, if later proven as true, are sufficient to show a statutory violation.

If the Administrative Law Judge determines that a **prima facie** violation has not been shown, the complaint will be dismissed. If a **prima facie** violation is demonstrated, the matter will be set for a hearing, and you will be provided an opportunity to submit a response. **You do not need to submit a response at this point.**

This Complaint was filed within 90 days of the general election. If the administrative law judge determines that the complaint establishes a prima facie case, the law requires that, on request of any party, the probable cause hearing be conducted within three business days of the judge's assignment to this matter, or up to seven days, for good cause shown. Mr. Armon did not request an expedited hearing in this matter. If either committee does not request an expedited probable cause hearing, the administrative law judge will hold the hearing within 30 days of receiving the assignment. We will notify you of the date of the probable cause hearing, if one is required.

The complaint process is described in Minn. Stat. §§ 211B.32 – .37 which can be found on the Office of Administrative Hearings' website at <http://mn.gov/oah/>. Questions can be directed to one of our staff attorneys at 651-361-7837 or [MaryBeth.Gossman@state.mn.us](mailto:MaryBeth.Gossman@state.mn.us).

Very truly yours,

TAMMY L. PUST  
Chief Judge

TLP:mbg  
Enclosure  
cc: Barbara Linert and Steven Timmer (letter only)



October 27, 2016

Michelle MacDonald  
1069 South Robert Street  
West St. Paul, MN 55118

Re: *In the Matter of Barbara Linert and Steven Timmer v.  
Michelle MacDonald*  
OAH 71-0320-33929

Dear Ms. MacDonald:

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The matter has been assigned for review to Administrative Law Judge Jessica A. Palmer-Denig. Within three business days, the Administrative Law Judge will make a preliminary determination of whether the complaint constitutes a prima facie violation of Minn. Stat. chs. 211A or 211B (2016). “Prima facie” means that the facts alleged, if later proven as true, are sufficient to show a statutory violation.

If the Administrative Law Judge determines that a prima facie violation has not been shown, the complaint will be dismissed. If a prima facie violation is demonstrated, the matter will be set for a hearing, and you will be provided an opportunity to submit a response. **You do not need to submit a response at this point.**

This Complaint was filed within 90 days of the general election **and includes a request for an expedited probable cause hearing**. If the administrative law judge determines that the complaint establishes a prima facie case, the law requires that the probable cause hearing must be conducted within three business days of the judge's assignment to this matter, or up to seven days, for good cause shown. We will notify you of the date of the probable cause hearing, if one is required.

The complaint process is described in Minn. Stat. §§ 211B.32 – .37 which can be

## EXHIBIT 10

found on the Office of Administrative Hearings' website at <http://mn.gov/oah/>. Questions can be directed to one of our staff attorneys at 651-361-7837 or [MaryBeth.Gossman@state.mn.us](mailto:MaryBeth.Gossman@state.mn.us).

Very truly yours,

TAMMY L. PUST  
Chief Judge

TLP:mbg  
Enclosure  
cc: Barbara Linert and Steven Timmer (letter only)



October 27, 2016

Barbara J. Linert  
4282 Braddock TL  
Eagan, MN 55123

**VIA E-MAIL ONLY**

Steven J. Timmer  
5348 Oaklawn Ave  
Edina, MN 55424  
stimmer@planetlawyers.com

Michelle L. MacDonald  
MacDonald Law Firm, LLC  
1069 S Robert St  
W St Paul, MN 55118

Re: *In the Matter of Barbara J. Linert & Steve J. Timmer (Michelle MacDonald)*  
QAH 71-0320-33929

Dear Parties:

Enclosed and served upon you please find the **NOTICE OF DETERMINATION OF PRIMA FACIE VIOLATION AND NOTICE OF AND ORDER FOR PROBABLE CAUSE HEARING** in the above-entitled matter.

If you have any questions, please contact my legal assistant Sheena Denny at (651) 361-7881, Sheena.Denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,

JESSICA A. PALMER-DENIG  
Administrative Law Judge

JPD:sd  
Enclosure  
cc: Docket Coordinator

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
PO BOX 64620  
600 NORTH ROBERT STREET  
ST. PAUL, MINNESOTA 55164

**CERTIFICATE OF SERVICE**

In the Matter of Barbara J. Linert & Steve J. Timmer (Michelle MacDonald)	OAH Docket No.: 71-0320-33929
---	----------------------------------

Sheena Denny, certifies that on October 27, 2016 she served the true and correct **NOTICE OF DETERMINATION OF PRIMA FACIE VIOLATION AND NOTICE OF AND ORDER FOR PROBABLE CAUSE HEARING** by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

Barbara J. Linert  
4282 Braddock TL  
Eagan, MN 55123

**VIA E-MAIL ONLY**  
Steven J. Timmer  
5348 Oaklawn Ave  
Edina, MN 55424

Michelle L. MacDonald  
MacDonald Law Firm, LLC  
1069 S Robert St  
W St Paul, MN 55118

OAH 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

vs.

Michelle MacDonald,

Respondent.

**NOTICE OF DETERMINATION OF  
PRIMA FACIE VIOLATION  
AND  
NOTICE OF AND ORDER FOR  
PROBABLE CAUSE HEARING**

On October 25, 2016, Barbara J. Linert and Steven J. Timmer (Complainants) filed a complaint under the Fair Campaign Practices Act with the Office of Administrative Hearings alleging that Michelle MacDonald (Respondent) violated Minn. Stat. § 211B.02 (2016) (false claim of support) in connection with her campaign for election to the Minnesota Supreme Court.

Following a review of both the complaint and the documents Complainants submitted in support, the undersigned Administrative Law Judge has determined that the complaint sets forth a prima facie violation of Minn. Stat. § 211B.02. For the reasons detailed in the Memorandum below, Complainants are permitted to proceed to a probable cause hearing on their complaint.

**THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS GIVEN** that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m. on Tuesday, November 1, 2016**. The hearing will be held by call-in telephone conference. At the appointed time, the parties are directed to:

- (a) Telephone **1-888-742-5095**
- (b) Enter the Conference Code: **396 255 8115#**

The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34 (2016). Information about the probable cause proceedings and copies of state statutes may be found online at <http://mn.gov/oah> and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the probable cause hearing, all parties have the right to be represented by legal counsel or appear on their own behalf. In addition, the parties have the right to submit evidence, affidavits, documentation, and argument for consideration by the Administrative Law Judge. By **12:00 p.m. on Monday, October 31, 2016**, the parties shall provide to

the Administrative Law Judge all evidence bearing on the case, with copies of the same items to the opposing party.

Any document filed with the Office of Administrative Hearings, or any documents that a party wishes to make part of the hearing record, may be filed in one of the following ways: (1) by **e-Filing** through the Office of Administrative Hearings' e-Filing system; (2) by **mail**; (3) by **facsimile** (if less than 50 pages total); or (4) by **personal delivery**. (See 2015 Minn. Laws. Ch. 63, § 7; Minn. R. 1400.5550, subp. 5 (2015)).

The e-Filing system is accessible at: <http://mn.gov/oah/forms-and-filing/efiling/>.

The Office of Administrative Hearings' facsimile number is: (651) 539-0310.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35 (2016).

If the Administrative Law Judge dismisses the complaint, the Complainants have the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: October 27, 2016

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JESSICA A. PALMER-DENIG  
Administrative Law Judge

## MEMORANDUM

Respondent is a candidate for the Minnesota Supreme Court in the November 8, 2016 election, and is challenging incumbent Supreme Court Justice Natalie Hudson. The complaint alleges that Respondent violated Minn. Stat. § 211B.02 by falsely implying on campaign material that she has the endorsement of the Minnesota Republican Party in that judicial election race.

Specifically, the complaint asserts that Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was published in a "Voter Guide" section of the newspaper's website. In the "Endorsements" section of her candidate profile, Respondent claimed she was endorsed by: Christians United in Politics, Republican Party of MN 2014, and "GOP's Judicial Selection Committee 2016."<sup>1</sup> Respondent was endorsed by the Republican Party of Minnesota in 2014, but she was not endorsed by the party in 2016. In addition, the complaint states that there was no "Judicial Selection Committee" under the party's then-operative constitution. There was a "judicial election committee," but, according to the complaint, this committee has no power of endorsement on its own. The complaint maintains that Respondent's references to "Republican" and "GOP" and her claim of endorsement by the nonexistent "GOP Judicial Selection Committee" were intended to falsely imply that she has the Republican Party of Minnesota's endorsement.

### **Standard for Prima Facie Determinations**

To establish a prima facie violation of the Fair Campaign Practices Act, the Complainant must allege sufficient facts to show that a violation of law has occurred.<sup>2</sup> The complaining party must submit evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of Minnesota Statutes, chapter 211A or 211B (2016).<sup>3</sup>

For purposes of a prima facie determination, the tribunal must accept the facts that are alleged in the complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible.<sup>4</sup> A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.<sup>5</sup>

<sup>1</sup> The complaint notes that the claim of endorsement by the "GOP Judicial Selection Committee" was recently removed from Respondent's profile on the *Star Tribune* website.

<sup>2</sup> Minn. Stat. § 211B.32, subd. 3 (2016).

<sup>3</sup> *Barry and Spano v. St. Anthony-New Brighton Indep. Sch. Dist.* 282, 781 N.W.2d 898, 902 (Minn. Ct. App. 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

## Analysis

Minnesota Statutes, section 211B.02 provides as follows:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

In *Niska v. Clayton*,<sup>6</sup> the Minnesota Court of Appeals upheld a decision of this tribunal finding that a person violated Minn. Stat. § 211B.02 by using the term “Republican Party of Minnesota” on multiple documents and on his website to promote candidates who lacked the party’s endorsement.<sup>7</sup> Similarly, in *Schmitt v. McLaughlin*,<sup>8</sup> the Minnesota Supreme Court held that an unendorsed candidate’s use of the initials “DFL” violated the statute because it implied to the average voter that the candidate had the endorsement, or at the very least the support of, the DFL Party.

The Administrative Law Judge concludes that the complaint alleges sufficient facts regarding Respondent’s claimed endorsements to support finding a *prima facie* violation of Minn. Stat. § 211B.02. This allegation will proceed to a probable cause hearing as indicated in the Order.

J. P. D.

<sup>6</sup> *Niska v. Clayton*, 2014 WL 902680 (Minn. Ct. App. 2014), *review denied* (Minn. June 25, 2014).

<sup>7</sup> *Niska v. Clayton*, No. 68-0325-30147, 2013 WL 1411608 (Minn. Office Admin. Hearings Mar. 12, 2013).

<sup>8</sup> 275 N.W.2d 587, 591 (Minn. 1979). See also *In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms “DFL” and “LABOR ENDORSED” on campaign materials violated the statute).



# RECEIVED

By: OAH on 10/27/16 3:06 p.m.

OAH Docket Number: 71-0380-33969

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In re The Matter of Barbara J.  
Linet & Steve J. Turner  
(Michelle MacDonald)  
 [Insert matter title]

**NOTICE OF APPEARANCE**

**PLEASE TAKE NOTICE that:**

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.
2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**
3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

Party's/Agency's Name: Michelle L. MacDonald

Email: Debbie.e.macdonald@LawFirm.com Telephone: D-612-554-0932

Mailing Address: 1009 So. Robert St. West St Paul, MN 55118  
 and → Michelle@MacDonaldLawFirm.com

Party's/Agency's Attorney: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Email: \_\_\_\_\_ Telephone: \_\_\_\_\_

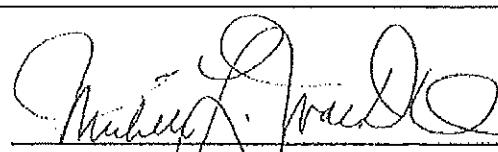
Mailing Address: \_\_\_\_\_

Respondent's/Opposing Party's Name: \_\_\_\_\_

Email: \_\_\_\_\_ Telephone: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Dated: 10/27/16

  
 Signature of Party/Agency or Attorney

Note: This form must be served upon the opposing party/agency. Counsel may not withdraw from representation without written notice.

**EXHIBIT 10**



**RECEIVED**  
by OAH on 10/28/16 2:24 p.m.  
**CANDIDATE**

## Michelle L. MacDonald

**Candidate:**

Supreme Court Associate Justice,  
Minnesota

**Incumbent:** No**City of residence:** Rosemount**Background:**

For 29 years, I am an attorney in the “trenches” helping thousands of people with a variety legal challenges before hundreds of judges at every level including appeals to the Minnesota Supreme Court and the United States Supreme Court of America. For 22 of those years, I have been a small claims court judge and family court referee. I am founder and volunteer president of [www.FamilyInnocence.org](http://www.FamilyInnocence.org), a nonprofit dedicated to keeping families out of court. I graduated from Boston College, Suffolk University Law School and the Harvard Program of Instruction for Lawyers. I am married with four grown children.

**EXHIBIT 9**

**Essay:**

We can no longer afford a government “of the lawyers, by the lawyers and for the lawyers.” The Constitution exists to uphold fundamental rights we have by virtue of being born into this world ---rights like “the air you breath.” Our laws, law enforcement, attorneys and courts regularly fail to recognize and uphold our liberty rights. Instead, to one degree or another, we are deprived of rights to live freely, to our property and resources, and to raise our children. Due process requires clear rules, government adherence to rules, a speedy trial, adequate legal representation and an appellate process. Law enforcement, attorneys and courts often fail to use their discretion wisely, and do not adhere to their own rules in attempts to “persecute” inherently good citizens, who have the right to be left alone if they are not harming anyone. Debtor's prison is supposed to be illegal, yet we can be subject to “pay or else” court orders. After my client sued a Judge, I experienced violations of my civil rights when that judge made me participate in that client's trial in handcuffs, a wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

**More information:** Candidate website*The information on this page was provided by the candidate.*

10/19/2016

politics

## Other candidates in this race

Natalie Hudson

# REPUBLICAN PARTY OF MINNESOTA CONSTITUTION

## Preamble

The Republican Party of Minnesota welcomes into its party all Minnesotans who are concerned with the implementation of honest, efficient, responsive government. The party believes in these principles as stated in the Declaration of Independence: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty, and the pursuit of happiness. Therefore, it is the party committed to equal representation and opportunity for all and preservation of the rights of each individual. It is the purpose of this constitution to ensure that the party provides equal opportunity for full participation in our civic life for all Minnesota residents who believe in these principles regardless of age, race, sex, religion, social or economic status.

## ARTICLE I Name and Object

### SECTION 1: Name.

The name of this organization shall be Republican Party of Minnesota.

### SECTION 2: Object.

The object of the party shall be the maintenance of government by and for the people according to the Constitution and the laws of the United States and the State of Minnesota, and the implementation of such principles as may from time to time be adopted by party conventions. To obtain this object it is essential the party shall organize at all levels to elect Republicans to public office.

## ARTICLE II Membership and Dues

### SECTION 1: Membership.

The membership of the party shall be composed of all citizens of the State of Minnesota who desire to support the objectives of the party.

### SECTION 2: Dues.

Payment of dues shall not be required as a condition of membership.

### SECTION 3: Rights.

Nothing in this constitution shall be construed to deny or abridge the rights of any voter to participate in any party caucus, primary or convention, where he/she is entitled by law to participate.

## ARTICLE III Congressional and Legislative Reapportionment Committee

### SECTION 1:

In the first odd numbered year following reapportion the State Executive Committee shall establish a standing committee to develop an operating policy and procedure manual for the next reapportionment period.

### SECTION 2:

The reapportionment committee shall consist of a chair and one person from each Congressional

District. It is recommended that the appointee have actual Congressional District and/or Basic Political Organizational Unit (BPOU) leadership apportionment experience. The state party chair shall appoint the chair of the reapportionment committee. The Congressional District representative shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding appointment, by the Congressional District executive committee.

**SECTION 3:**

The reapportionment manual shall be prepared by the reapportionment committee and submitted to the Executive Committee for approval. The Executive Committee shall submit the reapportionment manual to the State Central Committee no later than January 1 of each census year.

**SECTION 4:**

Following the approval of the reapportionment manual by the Executive Committee and the State Central Committee, in all cases concerning reapportionment in which it is not in conflict with the constitution and bylaws of the Republican Party of Minnesota, the manual shall govern Congressional and Legislative reapportionment matters for the current reapportionment process.

**ARTICLE IV**  
**Delegation of Power**

**SECTION 1: Basic Unit.**

The party shall be organized into BPOUs, i.e., one of the following: County, House District, or Senate District except that in any county containing four or more entire House Districts the county must organize as House or Senate Districts.

**SECTION 2: Organization.**

It shall be the responsibility of the BPOU committees to assist all endorsed Republicans seeking public office at least partly within their respective units, to expand the membership of the party within their respective units, and to organize or cause to be organized each ward, precinct, or other voting district in their unit. The form of enrollment shall be prescribed by the State Executive Committee and shall be uniform throughout the state. No qualifications for membership shall be imposed except as provided by this constitution. Opportunity for enrollment shall be open at all times to all voters who are eligible for membership under Article II.

**SECTION 3: Management.**

The management of the affairs of the party within each basic political organizational unit shall be vested in the BPOU committee, subject to the direction of state and Congressional District authorities as to matters within the scope of their respective functions.

**SECTION 4: Territorial Realignment.**

A county committee of a county containing fewer than four entire House Districts may disband the county organization and reorganize itself along either Senate or House District lines, by adding a portion of an adjoining county or allocating part of the county's territory to another BPOU. A county committee may also realign its territory by adding a portion of an adjoining county and/or allocating part of its territory to another BPOU. The procedure shall be by approval of at least 60% of the county convention of each of the involved counties, provided that notice of such proposal for reorganization was issued in the call of the convention. The county convention shall submit its transitional plans including proposed distribution of funds to accomplish such reorganization to the Congressional District and State Executive Committees for their review. The new organization shall have all of the rights and responsibilities of a BPOU. Such reorganization shall continue until the next state-wide reapportionment or until the county form of organization is restored by a convention of the precinct Delegates within the original county lines called by authority of the Republican Party of Minnesota State Executive Committee or any Republican

Party of Minnesota state convention. No BPOU that is organized as a County BPOU can be forced to reorganize as a House District or Senate District.

## ARTICLE V

### Conventions and Endorsements - General Provisions

**SECTION 1: Business and Call.**

**A.** Conventions shall transact such business as is specified in the call of the convention, and may transact such other business as a majority of the convention may determine, subject to the provisions of Article VIII, Section 2 of this constitution.

**B.** The call for a convention shall be issued at least ten (10) days prior to the convention, except that for an endorsing convention for a special election or for a post-primary endorsing convention, the call shall be issued at least five (5) days prior to the convention. Convention calls and reports required to be mailed prior to a convention may be issued electronically by email.

**SECTION 2: Registration.**

**A.** Notwithstanding Article II, Sections 2 and 3, registration fees may be assessed Delegates and Alternates attending a convention.

**B.** Once a Delegate or a seated Alternate has registered for the convention he/she remains part of the voting strength of the convention even if he/she leaves the convention prior to the convention's official adjournment.

**C.** A convention may close registration of Delegates and Alternates only if the convention call states the time at which registration will close. If the call states a registration closing time the convention may permit a later closing time for registration or may require the convention to remain open regardless of the language in the call.

**SECTION 3: Endorsements.****A. General Rules.**

1. It shall first be determined by a majority vote whether endorsement shall be considered for an office.

2. Voting on a candidate for endorsement for an office shall be by secret ballot. The convention or committee may decide by a two-thirds vote to endorse by a rising vote for any office for which there is only one candidate.

3. Votes may be cast for any person who by law is eligible for election to the office under consideration and who is eligible under this constitution to seek the endorsement, even though he/she has not been nominated or has withdrawn from nomination. Ballots may also be cast stating 'no preference' or 'undecided', or indicating no endorsement. Blank ballots or abstentions, unintelligible ballots, ballots marked only 'ü' or 'X', or ballots cast for an ineligible person or a fictional character shall not be included in determining the 60% vote needed for endorsement. No preprinted ballot shall be allowed unless options for 'no preference', 'undecided' and 'no endorsement' are included.

4. A motion of no endorsement may be adopted by a majority vote. The rules of a convention may limit how often or when such a motion may be made. However on any round of voting for endorsement, a motion of no endorsement shall be considered adopted if a majority of the ballots (excluding blanks) or a majority of the votes on a voice vote (excluding abstentions) is for 'no', 'none' or 'no endorsement'.

5. Excepting the 60% requirement in this Article, BPOU constitutions may establish different rules of endorsement for conventions relating to legislative districts or other areas entirely within the BPOU.
6. An endorsement may carry with it the commitment of party resources, finances and volunteers only when made at a convention that is representative of the entire electorate for the office. In the case of a proposal for endorsement of a candidate whose constituency is not coterminous with the territory of the convention, only those Delegates residing within such constituency shall vote upon the proposal. An endorsement for public office at a convention below the level of the one that is representative of the entire electorate for the office shall be no more than an expression of the sentiment of the convention.

**B. Pre-Primary Endorsement.**

1. If the public office sought by the candidate is legally partisan, the candidate must agree prior to being considered for pre-primary endorsement to seek the office as a Republican if he/she receives the endorsement.
2. Any candidate for any elective public office may be granted pre-primary endorsement by any state, Congressional District, BPOU or other authorized convention if he/she receives a 60% vote of the convention and if the 60% is greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote.
3. Only one candidate may be endorsed per seat for a particular office.
4. When more than one candidate is nominated for endorsement for an office, none of the candidates for that office shall be voted upon separately.

**C. Rules for Minnesota Supreme Court and Minnesota Court of Appeals Endorsements.**

1. As to candidates for judicial office, the Republican Party of Minnesota shall at its state convention consider whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.
2. After the report of the judicial election committee, the state convention shall proceed to the vote on whether endorsement should be considered.
3. If the state convention votes affirmative on consideration of endorsement, the Delegates shall vote on endorsement of a person for that particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals. Endorsement may be conferred upon any person who by law is eligible for election to the office and who is eligible under this Constitution to seek endorsement, even if such candidate has not sought endorsement by the Republican Party of Minnesota or has communicated that such candidate does not desire and/or will not use Republican Party of Minnesota endorsement.
4. Except where they conflict with the special rules stated in this paragraph, the provisions of Article V, Section 3, A. and B. apply to endorsing candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.

**D. Endorsement By State Central Committee.**

If a primary election for any Minnesota statewide office or for United States Senator results in the selection of a nominee other than the Republican-endorsed candidate, a meeting of the State Central Committee shall be called by the State Party Chair or by the State Executive Committee

within five (5) days after the certification of the primary election results by the State Canvassing Board. The purpose of this meeting shall be to consider a post primary endorsement of the nominee(s) winning the primary election. Such a meeting may also consider post primary endorsement of a Republican nominee for any other statewide office or United States Senator for which no pre-primary endorsement was made. The State Party Chair or the State Executive Committee may call a meeting of the State Central Committee at any time after the State Convention to consider Republican endorsement by the State Central Committee of any candidate for statewide office or for United States Senator, if (1) the State Convention did not endorse any candidate for that office and such candidate's candidacy for that office had not been announced prior to the State Convention or (2) the endorsed candidate dies, withdraws, or is otherwise ineligible for election to the office sought. Any endorsement by the State Central Committee shall require a 60% vote of the registered Delegates (including seated Alternates) at such State Central Committee meeting and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates at such meeting as established by the last report of the credentials committee preceding such vote.

**E. Vacancies In Nominations.**

In the event of the death or withdrawal of an endorsed nominee for statewide office prior to the primary, or in the event of the death or withdrawal of a candidate after the primary, but 21 days prior to the general election, the State Central Committee shall consider the endorsement of a substitute nominee or candidate. The call for the meeting shall be issued at least five days prior to the scheduled meeting. In the event the candidate withdraws or dies less than 21 days prior to the general election, the State Executive Committee shall consider endorsement of a substitute candidate. Any endorsement by the State Central Committee shall require a 60% vote of the committee and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote. Any endorsement by the State Executive Committee shall require a 60% vote of the committee and such vote must be greater than or equal to at least a majority of the members of the committee.

**F. Legislative District Endorsing Conventions.**

1. A legislative district endorsing convention wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
2. Where a legislative district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
3. Where a legislative district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
4. In the event that a majority of the precinct chairs from a legislative district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. F. 2. or 3. F. 3. of this Article, shall issue the call for such convention.
5. In the event that all of the BPOU committees from a legislative district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

6. Eligible voters at legislative district endorsing conventions shall be the Delegates or their Alternates who reside within the legislative district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus.

7. Should the Delegates and Alternates qualified to vote at a legislative district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**G. County and County District Endorsing Conventions.**

1. For a county containing four or more entire House Districts a county convention may be held solely for the purpose of endorsement for county offices elected on a countywide basis. A county district convention may be held solely for the purpose of endorsements for county offices such as County Commissioner if elected by districts.

2. If a county or county district office lies wholly within a BPOU, a county convention shall be called by the BPOU committee.

3. If a county or county district office crosses BPOU lines, but lies wholly within a Congressional District the convention may be called by the Congressional District Executive Committee unless otherwise provided for in the Congressional District constitution.

4. If a county office crosses BPOU and Congressional District lines, the convention may be called by the State Executive Committee.

5. Should a county or county district consist of more than one (1) BPOU, a request for a county convention must be submitted by the committees of a majority of the BPOUs to:

a. Congressional District Executive Committee, unless otherwise provided for in the Congressional District constitution, if a county lies wholly within a Congressional District; or

b. State Executive Committee, if the county office crosses Congressional District lines.

6. In the event that all of the BPOU committees from a county or county district office that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

7. Eligible voters at a county or county district convention shall consist of those Delegates and Alternates who reside within a county or county district and who were duly elected at the most recent Republican Party precinct caucus held within the county or county district.

8. Should the Delegates and Alternates qualified to vote at the county or county district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**9.** For Hennepin County the Hennepin County subcommittee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor. For Ramsey County the Congressional District committee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor.

**H. Judicial District Endorsing Conventions.**

- 1.** A Judicial District endorsing convention may be held to consider endorsement of a candidate for Judge to a Judicial District Court in the district.
- 2.** If a Judicial District lies entirely within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
- 3.** If a Judicial District lies entirely within a County, the County Committee may issue the call for an endorsing convention and appoint the convener.
- 4.** If a Judicial District crosses Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
- 5.** If a Judicial District lies entirely within a Congressional District, and a majority of the BPOUs lying in whole or in part within the Judicial District petition in writing requesting an endorsing convention, the chair(s) of the Congressional District shall issue the call for the convention.
- 6.** If a Judicial District crosses Congressional District lines and if a majority of the BPOUs that lie in whole or in part within the Judicial District petition the State Party Chair in writing requesting an endorsing convention, the State Party Chair shall issue the call for the convention.
- 7.** In the event that all of the BPOUs lying in whole or in part within a Judicial District should request a Judicial Endorsing Convention, then the BPOUs may issue a joint call for such an endorsing convention and appoint the convener.
- 8.** Eligible voters at Judicial District Endorsing Conventions shall be those who serve as Delegates or their Alternates to their Congressional District Convention who reside within the Judicial District.

**I. City, Ward, Township and School Board Endorsing Conventions.**

- 1.** For cities and townships not included in Article X, Section 4, a city, ward, township or school board endorsing convention may be held for the purpose of endorsing candidates for city offices, township offices and school board, and the provisions in Article V, Section 3, I., 1-9 shall only apply to such cities, townships and school districts.
- 2.** An endorsing convention for such a city, ward, township or school district wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
- 3.** An endorsing convention for such a city, ward, township or school district wholly within a given Congressional District may be held subject to the provisions of said Congressional District constitution and/or bylaws, provided said provisions are not in

conflict with state statutes or the Republican Party of Minnesota State Constitution.

**4.** Where such a city, ward, township or school district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.

**5.** Where such a city, ward, township or school district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.

**6.** In the event that a majority of the precinct chairs from such a city, ward, township or school district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. I. 4. or 3. I. 5. of this Article, shall issue the call for such convention.

**7.** In the event that all of the BPOU committees from such a city, ward, township or school district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

**8.** Eligible voters at such city, ward, township or school district endorsing conventions shall be the Delegates or their Alternates who reside within the city, ward, township or school district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus held within the political boundaries of the legislative district.

**9.** Should the Delegates and Alternates qualified to vote at such a city, ward, township or school district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**SECTION 4: Seating of Alternates.**

Once the temporary organization has been established, the first order of business of a state or Congressional District convention shall be the seating of Alternates. The permanent voting roll of the convention shall be composed of the Delegates of each BPOU who actually are present, and in the absence of any Delegate to the convention, an Alternate shall be seated in his/her stead during his/her absence according to the procedure established by the constitution or bylaws of the BPOU. When a Delegate returns to the floor of the convention, he or she will be seated immediately.

**SECTION 5: Election and Terms of Delegates.**

**A.** All state, Congressional District, BPOU, and Delegates and Alternates shall be elected in general election years and shall hold office for a term of two years or until their successors are elected, or upon adoption in their respective BPOU constitution, they may elect Delegates and Alternates to the Congressional District and state conventions annually in the same manner as provided in the general election year, and these Delegates and Alternates elected under this option shall hold office for a term of one year, or until their successors are duly elected.

**B.** All affiliate Delegates and Alternates shall serve a two year term or until their successors are elected. Affiliate Delegates and Alternates shall not hold the same office for consecutive terms. An affiliate Delegate or Alternate may not be a regular party Delegate or Alternate to the same

convention. Affiliate Delegates and Alternates to Congressional District conventions must reside in the Congressional District and must be elected by the affiliate members who reside in the Congressional District and will be legally qualified voters in the next general election.

C. In compliance with the rules of the Republican National Convention, no Delegate or Alternate may be an automatic Delegate or Alternate. Each Delegate or Alternate must be elected by his/her respective convention. No Delegate to the Republican National Convention shall be bound by party rules or by state law to cast his/her vote for a particular candidate on any ballot at the convention except that the state convention may bind the Delegates whom it elects to the National Convention of the Republican Party on the first ballot to vote for a candidate for the office of President of the United States, unless they be released by said candidate.

**SECTION 6: Vacancies.**

At all levels within the party a vacancy shall occur in a Delegates position upon his/her death, resignation or removal from the geographical area from which he/she was elected, or upon the failure of the body having the power of election to fill such position, if no duly elected Alternate is available to fill the vacancy. Vacancies shall be filled in the same manner as the original Delegate or Alternate was elected.

**SECTION 7:**

Nothing in this Article is intended to affect the right of the convention to authorize, by rule, the Delegates present to vote the entire voting strength of the BPOU.

**ARTICLE VI**  
**State Convention**

**SECTION 1: Composition.**

State conventions shall be composed of the following:

A. Delegates from various BPOUs of the state who are elected at their conventions. The number of Delegates from the various BPOUs shall be apportioned among the BPOUs upon such basis as the State Executive Committee or the State Central Committee may determine, provided that the basis of apportionment shall be uniform throughout the state, and shall be based upon the vote for the Republican candidate for Governor in the last preceding statewide general election; or, if such election were a presidential election, the vote cast for the Republican candidate for President. If the number of Delegates apportioned to a BPOU is less than two, the total number of Delegates shall be increased to a minimum of two Delegates for each BPOU.

B. Subject to Article V, Section 5, B., two Delegates and two Alternates elected by each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.

**SECTION 2: Committees.**

State convention committees consisting of a platform committee, a rules committee, a credentials committee, a judicial election committee, a nominating committee and such other state convention committees as may be necessary or desirable shall be organized. Members in each committee shall be appointed as follows:

A. An equal number of members from each Congressional District to be appointed by the district chair(s) of the respective Congressional District, except as provided by Section 5A below with respect to the judicial elections committee.

B. Members at large to be appointed by the state party chair, the number of which is not to exceed 15% of the total membership of any committee.

C. A chair to be appointed by the state party chair.

**SECTION 3: Nominations Committee.**

A. To be eligible to be considered for endorsement or election, candidates for statewide nonjudicial endorsement and candidates for National Delegate or Alternate must meet all legal requirements and submit nominating petitions to the Nominating Committee containing the printed names and signatures of a minimum of 2% of the State Convention Delegates.

B. The Nominations Committee shall report to the convention those candidates who have met the petition and legal requirements at Section 3A and whether the Nominating Committee deems the candidates to be qualified or unqualified to receive endorsement or be elected.

**SECTION 4: Rules Committee.**

The Rules Committee report shall be mailed at least seven (7) days in advance of the convention.

**SECTION 5: Platform Committee.**

A. The function of the platform committee shall be to maintain a permanent platform for the Republican Party of Minnesota based upon the platform adopted at the previous regular Republican State Convention. The permanent platform may only be amended as provided in this constitution and the rules of the state convention. The committee will be responsible for performing the work described in subsection C. below.

B. The platform committee shall meet in even numbered years at the call of its chair or the state party chair. The final committee report shall be presented to the state party chair and be mailed to convention Delegates and Alternates at least seven (7) days prior to the state convention. The committee shall then present the final committee report to the state convention to be voted on in the manner prescribed by this constitution and the rules of the convention.

C. In even numbered years the platform committee shall review the permanent platform and all of the resolutions passed at Congressional District conventions for Congressional Districts that have a representative on the platform committee and any additional resolutions brought to the committee in the manner prescribed by the state convention rules. The committee shall determine which resolutions are new resolutions (i.e., address issues that are not addressed in the current permanent platform). The committee will recommend to the state convention the following changes:

1. Adoption of the new resolutions identified by the committee;
2. Renewed adoption of any resolution of the platform designated to sunset;
3. Elimination of those resolutions that are no longer germane;
4. Combining those resolutions that are similar;
5. Clarifying those resolutions that are confusing;
6. Reconsideration of those resolutions that are in conflict with other resolutions; and
7. Any resolution submitted by a majority of Congressional Districts shall be included in the platform committee final report.

The Committee has discretion to make recommendations to the state convention to limit the size of the platform including a recommendation to designate resolutions of the platform for

sunsetting.

**D.** All motions related to the platform committee report shall be voted upon at the state convention in the manner prescribed in the convention rules and need to be adopted by a minimum of sixty (60) percent of the last credentials report.

**E.** The creation of a permanent platform for the Republican Party of Minnesota will not limit the authority of any BPOU or Congressional District with respect to adopting their own platform.

**SECTION 6: Judicial Election Committee.**

**A.** The judicial election committee will consist of two (2) members from each Judicial District appointed by their respective Judicial District chair(s).

**B.** The judicial election committee will meet for the purpose of reviewing and encouraging possible candidates for endorsement as well as preparing a voters guide on all known judicial candidates and incumbent judges of the Minnesota Supreme Court and the Minnesota Court of Appeals.

**C.** At the state convention, the judicial election committee will offer its report before it is determined by majority vote whether endorsement shall be considered for each particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals which is subject to the upcoming election.

**D.** The chair of the judicial election committee (or in the chair's absence, a substitute elected by the members of the committee) shall give the report of the committee for each particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals, which is subject to the upcoming election.

**E.** Within fourteen (14) days after the close of filing for candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals, the chair of the judicial election committee will present the voters guide to the State Executive Committee for approval. Once approved, the voters guide may be distributed to the general public.

**SECTION 7: Time and Place of Convention.**

A state convention of the party shall be held in each general election year as required by Minnesota State Statutes, at such time and place as the State Central Committee may determine. Special state conventions may be called at such other times and places and for such purposes as the State Central Committee may determine.

**SECTION 8: Issues Conference.**

In odd-numbered years the State Central Committee may organize a conference of party activists for the purpose of studying issues of topical interest to the Party. The conference shall be open to all interested Republicans and shall not be limited to State Convention Delegates and Alternates.

**SECTION 9: Presidential Electors.**

**A.** Presidential Electors shall be nominated by the State Convention in the year of each Presidential election as follows: (i) two (2) Presidential Electors shall be nominated at-large by the State Convention Delegates in accordance with the rules of the State Convention; and (ii) each Congressional District shall place in nomination one (1) Presidential Elector (a Congressional District Elector-Nominee) as provided in Article VII, Section 3, who shall be nominated by the affirmative vote of the State Convention, in accordance with the Rules of the State Convention.

**B.** Each Congressional District shall report to the State Convention the name of that Congressional District's Congressional District Elector-Nominee in the manner provided in the Rules of the State Convention.

C. If a Congressional District fails to select a Congressional District Elector-Nominee or a Congressional District Elector-Nominee is unable or unwilling to serve as a Presidential Elector prior to being nominated by the State Convention, a substitute Congressional District Elector-Nominee shall be placed in nomination in accordance with the Constitution or Bylaws of the Congressional District. If no provision exists in the Congressional District's Constitution or Bylaws for a substitute Congressional District Elector-Nominee, the Presidential Elector to be placed in nomination by that Congressional District shall instead be nominated by the State Convention Delegates in the manner provided for an at-large Presidential Elector as set forth above.

D. No person shall be nominated a Presidential Elector unless that person has been selected as a Congressional District Elector-Nominee or nominated at-large as provided herein.

E. If any Presidential Elector that has been nominated by the State Convention is unable or unwilling to serve after the state convention, the state executive committee shall nominate a replacement from the geographic body that nominated the original Presidential Elector.

## ARTICLE VII Congressional District Conventions

**SECTION 1: Composition.**

Congressional District conventions shall be composed of the following residents of the district:

A. Delegates apportioned to and elected at the BPOU convention, in the same manner as Delegates to state conventions.

Any BPOU that crosses Congressional District lines shall allot its apportioned Delegates to the Congressional Districts using the Republican vote cast for either Governor or President in the most recent general election. The manner of election shall be determined by the BPOU constitution, bylaws or by a motion of its convention.

B. Subject to Article V, Section 5, B., one Delegate and one Alternate who are residents of the Congressional District elected at a Congressional District caucus held by any of the statewide affiliate organizations as listed in the party bylaws, provided that the affiliate has at least ten eligible members residing in the Congressional District.

**SECTION 2: Time and Place of Convention.**

Congressional District conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, or the committees of the respective Congressional District, and at such other times and for such other purposes as the committee calling the conventions may determine. The Congressional District committee shall determine the place of holding Congressional District conventions in each district.

**SECTION 3: Presidential Elector Nominees.**

A. In each Presidential election year, each Congressional District shall be entitled to place in nomination one (1) person to be that Congressional District's Congressional District Presidential Elector-Nominee. A Congressional District Presidential Elector-Nominee may be selected by: (a) the affirmative vote of the Congressional District's Delegates at the Congressional District Convention held in a Presidential election year in accordance with the rules of the District Convention; or (b) by that Congressional District's District Convention Delegates in the manner provided in the Congressional District's constitution.

B. Each Congressional District Elector-Nominee shall be reported to the State Convention and nominated by the State Convention as provided in Article VI, Section 6 of this Constitution.

**ARTICLE VIII**  
**Basic Political Organizational Unit Conventions**

**SECTION 1: Composition.**

BPOU conventions shall be composed of the following residents of the BPOU: Delegates elected at the precinct caucuses that are held in each precinct every general election year as required by Minnesota statutes. The number of Delegates and Alternates at each convention and the basis of their apportionment shall be determined by the BPOU committee, provided that such basis shall be uniform throughout the BPOU and shall be based on the vote cast for the Republican candidate for Governor in the past preceding statewide general election; or if such election were a presidential election, the vote cast for the Republican candidate for President. Special caucuses for one or more precincts may be called by the BPOU committee in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies in precincts where such exist at the time of notice.

**SECTION 2: Time and Place of Convention.**

BPOU conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, the State Central Committee, the Congressional District committee or the BPOU committee. The conventions shall precede Congressional District and state conventions. Special BPOU conventions may be held at the call of the State Executive Committee, the State Central Committee, the Congressional District committee, or the BPOU committee at such time and for such purpose as the committee calling the same may determine. BPOU conventions shall be held at a place determined by the respective committee issuing the call.

**SECTION 3: Delegates and Alternates to State, Congressional District and Judicial District Conventions.**

Delegates and Alternates to the Congressional and Judicial Districts and to state conventions shall be elected at the BPOU conventions in even numbered years; or if provided in the BPOU constitution may be elected annually. A BPOU may elect up to twice as many Alternates as the number of Delegates allotted, provided that the BPOU convention or constitution specifies a method for the orderly seating of said Alternates to fill vacancies in the delegation. The qualifications to be elected a Delegate or Alternate are residence in the electing unit and being a legal and qualified voter in the next general election. All disputes concerning the seating of Alternates shall be settled according to that BPOUs constitution or bylaws. If seating of Alternates is not addressed in the BPOUs constitution or bylaws, then a caucus of the Delegates from that BPOU will meet to settle the issue.

**ARTICLE IX**  
**State Party Administration**

**SECTION 1: State Central Committee.**

**A. General Management.**

The general management of the affairs of the party in the state shall be vested in the State Central Committee, subject to the control of the state convention and this constitution.

**B. Composition.**

The State Central Committee shall consist of the following:

**1. The Members of the State Executive Committee and the Congressional District Chairs.**

Where the Congressional District constitution provides for one chair and one deputy chair instead of two chairs, the chair and the deputy chair will be members of the State Central Committee. The Congressional District chairs and Congressional District representatives to the State Executive Committee may appoint a designee to serve in their absence

provided that the designee is either a State Central Committee Alternate or Congressional District officer from his/her Congressional District. The state party officers, the national committeeman and committeewoman, and the state finance chair may appoint a designee to serve in their absence provided that the designee is a State Central Committee Alternate or Congressional District officer.

**2. One Delegate-at-large from each Congressional District.**

If a Congressional District constitution provides for a Congressional District representative to the State Executive Committee other than a Congressional District chair, then this person will be the Congressional District Delegate-at-large. If a Congressional District constitution provides that a chair will represent the Congressional District on the State Executive Committee, then the Congressional District shall elect in accordance with its constitution a Delegate-at-large and an Alternate in odd numbered years from within the Congressional District.

**3. One Delegate and one Alternate, elected from each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.**

**4. 300 Delegates and up to three times as many Alternates apportioned among the Congressional Districts, determined by the ratio of each Congressional District's Republican vote in the last general election for President or Governor. Congressional Districts shall further apportion all of their Delegates to their BPOUs, and no BPOU or portion thereof may be disenfranchised. The Congressional District shall determine the method for ensuring enfranchisement. Nothing herein shall be construed to require that every BPOU fragment qualify for its own Delegate or Alternate.**

The Delegates and Alternates shall be elected in odd numbered years from within the Congressional District in accordance with the provisions of the Congressional District constitution. A Congressional District Delegate or Alternate elected pursuant to this section shall serve a two year term commencing on the date of his/her election and terminating on the date his/her successor is elected. Such Delegates and Alternates must reside in the Congressional District and be eligible to be a legally qualified voter in the next general election.

In the event that any Congressional District Delegate and one of his or her Alternates are unable to attend a meeting of the State Central Committee, the Congressional District constitution shall provide for a procedure for appointment of a replacement from among the other Alternates elected in that Congressional District.

A vacancy in a Congressional District Delegate position shall be filled for the unexpired term by one of his or her Alternates if any, otherwise a vacancy in a Delegate or Alternate position may be filled for the unexpired term by the respective body of officers having power of appointment or election.

**5. Each Republican state constitutional officer and each Republican member from Minnesota of the United States Senate or the House of Representatives, or his/her appointee, shall be a member of the State Central Committee for the duration of his/her term of office.**

**6. The Speaker of the Minnesota House of Representatives, if a member of the Republican Caucus or his/her appointee (otherwise the leader of the House Republican Caucus or his/her appointee) and the leader of the Republican Caucus in the Minnesota State Senate or his/her appointee.**

**SECTION 2: State Executive Committee.**

**A. Composition.**

The State Executive Committee shall consist of the following:

1. The state chair, deputy chair, secretary and treasurer;
2. The national committeeman and committeewoman;
3. One district chair from each Congressional District or a Congressional District representative as provided for in the Congressional District constitution or bylaws who shall serve until a successor is elected;
4. The state finance chair.

**SECTION 3: State Party Officers.**

*[Prior to the election of a Chair in 2013, the positions of Secretary and Treasurer shall remain as one position.]*

**A. Composition.**

The state party officers shall consist of the following:

1. Chair
2. Deputy chair
3. Secretary
4. Treasurer

**B. Elections, Terms and Removals**

1. The State Party Chair, Deputy Chair, and Secretary shall be elected at large by the State Central Committee in accordance with the bylaws or upon the occurrence of a vacancy, as provided in clause 4 below.
2. At the first Executive Committee meeting after the election of a Party Chair or in the event of a vacancy in the Treasurer position, the Executive Committee shall elect a Treasurer by a 2/3 majority vote of the full membership of the Executive Committee. The Treasurer cannot simultaneously hold any other state party officer position.
3. State party officers shall not serve more than four (4) consecutive full terms in the same office. Unless otherwise provided, each party officer shall serve a two year term in accordance with the procedures established in the bylaws.
4. (i) Any state party officer may be removed by a two-thirds vote of the full membership of the State Executive Committee and confirmation by a vote of a simple majority of those present at the next meeting of the State central Committee. This party officer's position shall be considered vacant until the next State Central Committee meeting (ii) Any state party officer may be removed by a two-thirds vote of those present at any meeting of the State Central Committee.
5. In the event of a vacancy in the office of state chair, the deputy chair shall carry out the duties of the chair until a new state chair is elected and the State Central Committee shall meet within forty-five (45) days thereafter to elect a new state chair. In the event of a vacancy in the office of deputy chair, secretary, or treasurer, the state chair may appoint

an acting deputy chair, secretary, or treasurer subject to ratification by the State Executive Committee within thirty days after the appointment, to carry out the duties of the vacant office until a new officer is elected. The State Central Committee shall elect a new deputy chair or secretary at its next regularly scheduled meeting or, if such meeting is scheduled within thirty days after the vacancy occurs, at the second regularly scheduled meeting after the vacancy occurs.

**SECTION 4: General Provisions Relating to State Party Administration.**

**A. Terms of Appointees.**

Unless otherwise provided, persons appointed by a state party officer under this constitution shall have terms of office expiring with the expiration of the term of the appointing officer. Each such person may be removed at the discretion of the appointing officer. In the case of the death, removal from office or geographical area, or resignation of the appointing officer the persons appointed by such state party officer shall have terms expiring with the election by the State Central Committee of the new state party officer.

**B. No state party officer shall hold his or her office and at the same time receive monetary or inkind payment from any candidate or its campaign.**

**C. The state chair and deputy chair shall meet with the Congressional District chairs as a group at least once every three months.**

**ARTICLE X**  
**Congressional District Party Administration**

**SECTION 1: Congressional District Committee.**

**A. Duties and Responsibilities.**

The management of the affairs of the party pertaining to each Congressional District shall be vested in the Congressional District committee of such Congressional Districts, subject to the direction of the State Central Committee, the State Executive Committee, and the Congressional District convention, provided that the Congressional District committee shall have no jurisdiction over local affairs within the respective BPOUs in the Congressional District.

**B. Composition.**

The composition of each Congressional District committee shall be provided in their respective Congressional District constitution and/or bylaws.

**C. Officers.**

The officers of each Congressional District committee shall be at least one chair, a treasurer and such additional officers as may be determined by each Congressional District constitution and/or bylaws.

**D. Election of Officers.**

The Delegates to each Congressional District convention held in odd numbered years shall elect the officers of the Congressional District committee from any members of the party residing within the district.

**SECTION 2: Congressional District Executive Committee.**

The Congressional District Executive Committee shall consist of the officers of the Congressional District committee and such additional members as provided by the respective Congressional District constitution and/or bylaws.

**SECTION 3: Removals.**

Unless a Congressional District constitution or bylaws provide otherwise, any officer of a Congressional District committee, or any member of the Congressional District Executive

Committee, may be removed by a two-thirds vote of those committee members present at the Congressional District or Congressional District Executive Committee meeting, as applicable.

**SECTION 4: City Committees.**

For cities of the first class (and for cities located wholly within Hennepin County having a population of 75,000 or more), it shall be responsibility of the respective Congressional District committee to organize or cause to be organized such cities and wards thereof, located within their Congressional District, for city elections. The Congressional District committee may determine the number of Delegates and Alternates for such a city or ward convention and the basis of their apportionment, provided that such basis shall be uniform throughout the city and the wards thereof, and if such Delegates and Alternates are elected at the precinct caucuses held in even numbered years the apportionment shall be based on the Republican Party vote in the last general election for President or Governor. The constitution and/or bylaws of the respective Congressional District shall provide for the establishment of a city committee for such a city. A Congressional District may also give power and responsibilities to such a city committee, including the authority to elect officers and to call endorsing conventions for city office, subject to the provisions of the Congressional District constitution and/or bylaws.

**ARTICLE XI**  
**Basic Political Organizational Unit Administration**

**SECTION 1: BPOU Committee.**

**A. Composition.**

The BPOU committee shall consist of the BPOU party officers and such other members as the BPOU constitution, bylaws, or convention may prescribe.

**B. Officers.**

The officers of each BPOU shall be at least one chair and such additional officers as may be determined by each BPOU constitution and/or bylaws.

**C. Election of Officers.**

The officers and other members of the BPOU committee shall be elected at each BPOU convention held in odd numbered years.

**D. Management and Fundraising.**

The management of the affairs of the party within the BPOU shall be as set forth in Article IV. Organizers or other representatives of state or Congressional District authorities shall not solicit membership or funds at an event held within any BPOU without at least 14 days written prior notice to the BPOU chair(s). (See Article IV, Section 2.)

**SECTION 2: BPOU Executive Committee.**

The BPOU convention may provide for a BPOU executive committee of such size as it deems proper, which shall be members of the BPOU committee.

**SECTION 3: Removals.**

Unless a BPOU constitution or bylaws provide otherwise, any BPOU representative on a Congressional District committee, or officer of a BPOU executive committee may be removed by a two-thirds vote of those members present at a BPOU committee meeting.

**SECTION 4: Vacancies in Precinct Offices.**

The BPOU chairman or chair with the approval of the BPOU committee may call a special caucus, for one or more precincts, in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies where such exist at the time of notice, or may provide for the appointment of an acting officer until an officer is duly elected.

## **ARTICLE XII** **Judicial District Organization and Administration**

### **SECTION 1:**

A Judicial District convention may create and organize a Judicial District Committee. A notice of intent to consider forming a Judicial District Committee shall be included in the call of the convention along with the proposal to consider endorsement. If such committee is created and organized, it shall be strictly auxiliary to the Republican Party of Minnesota and shall have no other powers except as provided herein. If a Judicial District Committee is formed, it shall search for candidates for judicial office and it may call conventions of its Judicial District. If a convention endorses for a judicial office, the Committee shall be responsible to secure the election of the endorsed candidate.

## **ARTICLE XIII** **National Committeeman and Committeewoman**

### **SECTION 1:**

#### **Selection of National Committeeman and National Committeewoman.**

In the year of each presidential election, immediately before or immediately after the state convention that precedes the Republican National Convention, the State Central Committee shall meet and select a national committeeman and a national committeewoman.

## **ARTICLE XIV** **Affiliates**

### **SECTION 1:**

#### **Purpose and Organization.**

The right of special organizations having Republican affiliations to exist and carry on their activities as they see fit, consistent with the object, platforms, and principles of the party shall be recognized. The organization of permanent local clubs and organizations of party members for the purpose of holding meetings and carrying on other activities in furtherance of party and public welfare shall be permitted and encouraged. The activities of all such organizations during the election campaigns shall be coordinated with authorized party activities and subject to the direction of the regularly constituted party organizations.

### **SECTION 2:**

#### **Procedures for Determining Affiliate Status.**

##### **A. Organizational Requirements for Affiliate Status.**

Each Organization applying to be recognized as an Affiliate Organization of the Republican Party of Minnesota shall submit to the State Party Chair a copy of its constitution, bylaws, any other governing documents and an Executive Officer roster of the organization. The organization shall hold a convention at least bi-annually to elect officers and delegates/alternates as applicable. Unless otherwise provided in the organization's constitution and/or bylaws, such convention shall be subject to the requirements in Article V.

##### **B. Procedures for Determining Affiliate Standing.**

The State Executive Committee shall review all affiliates' standing on a yearly basis. Written notice must be sent to the presiding officer of the affiliate no later than twenty (20) days prior to a State Executive Committee meeting at which the affiliate's standing will be reviewed. The State Executive Committee shall annually forward its recommendation of affiliates in good standing to the State Central Committee to be certified by the State Central Committee.

### **SECTION 3:**

#### **Representation at State and Congressional District Conventions**

Authorized statewide Affiliates shall be entitled to voting representation at Republican State Conventions in accordance with Article VI, Section 1, B. Authorized statewide Affiliates may be entitled to voting representation at Congressional District Conventions, subject to qualification, in accordance with Article VII, Section 1, B.

## ARTICLE XV

### Constitution and Bylaws, Committee and Amendments

**SECTION 1: Constitution and Bylaws Committee.**

The Constitution and Bylaws Committee shall consist of a chair, and two persons from each Congressional District. The state party chair shall appoint the chair of the Constitution and Bylaws Committee. The Congressional District representatives shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding the appointment, by the Congressional District Executive Committee.

The Constitution and Bylaws Committee shall give consideration to and may propose appropriate amendments and/or revisions of the Constitution to the state convention. The Constitution and Bylaws Committee shall also give consideration to and propose appropriate amendments of the bylaws to the State Central Committee. One third of the committee members shall constitute a quorum.

Any member of the Constitution and Bylaws Committee shall have the privilege of addressing the state convention or the State Central Committee when any report of the Constitution and Bylaws Committee is being considered.

**SECTION 2: Amendments to the Constitution.**

This constitution may be amended by a majority vote at any state convention, provided that any proposal for amendment shall be referred to the state Constitution and Bylaws Committee and reported out of said committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the convention.

**SECTION 3: Bylaws.**

The State Central Committee and State Executive Committee shall operate under such bylaws as are deemed necessary for the transaction of the business of the party. The bylaws shall contain the specific delegation and division of responsibilities and duties among the various departments of the state organization and may specify whatever rules and administrative procedures the State Central Committee deems necessary.

**SECTION 4: Amendments to the Bylaws.**

The bylaws may be amended by a two-thirds (2/3) vote at any State Central Committee meeting after written notice of any proposal for amendment has been submitted with the notice of the meeting. Any proposal for amendment shall be referred to the state Constitution and Bylaws Committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the State Central Committee Meeting.

## ARTICLE XVI

### General Provisions

**SECTION 1: Other Constitutions and Bylaws.**

Any body within the party organization may adopt and amend a constitution and/or bylaws for its own government not inconsistent with this constitution.

**SECTION 2: Removals.**

Notice of every proposal for removal by any committee or other body of the party shall be included in the notice of the meeting, and the individual concerned shall be served with a detailed statement of the charges against him/her at least ten days prior to such meeting.

**SECTION 3: Vacancies.**

- A. All vacancies shall be filled for the unexpired term by the respective bodies or officers having power of election or appointment, except officers or members of the Congressional District or BPOU committees that shall be filled by such committees.
- B. A vacancy shall occur upon the death or resignation of an officer or committee member or upon his/her removal from the geographical area from which he/she was elected.

**SECTION 4: Financial Data/Congressional District/Basic Political Organizational Unit, and Legislative District Budgets.**

- A. Upon request by the state party treasurer, the financial officer of any organization recognized under this constitution including but not limited to each Congressional District, each BPOU/Legislative District organization and affiliate shall prepare biennial budgets or submit financial data pertaining to the organization for review and shall submit financial data to the state party treasurer.
- B. The party treasurer shall report at least semiannually on the financial status of the state party to members of the State Central Committee.
- C. All money received in the name of the Republican Party of Minnesota shall be deposited in its account. All money received shall be reported by the state party treasurer along with copies of any reports required by state or federal law.
- D. No contribution shall be accepted and a unit of the party shall make no expenditure at a time when the office of treasurer of the respective unit is vacant.

**SECTION 5: Improper Use of Party Funds.**

No loan, in any form, may be made to any individual or party officer. In the event that any party officer, at any level of the Republican Party of Minnesota, converts to his/her own use any Republican Party funds, other party officers shall report such occurrence to the Chair of the Republican Party of Minnesota, diligently encourage and assist all law enforcement personnel in prosecuting the violator to the full extent of the law and shall work diligently to recover the misappropriated party funds.

**ARTICLE XVII**  
**Parliamentary Authority**

The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the party in all cases to which they are applicable and in which they are not inconsistent with the constitution and bylaws of the Republican Party of Minnesota, the statutes of the State of Minnesota, or any special rules of order the party may adopt.

Amended May 2012

# REPUBLICAN PARTY OF MINNESOTA CONSTITUTION

## Preamble

The Republican Party of Minnesota welcomes into its party all Minnesotans who are concerned with the implementation of honest, efficient, responsive government. The party believes in these principles as stated in the Declaration of Independence: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty, and the pursuit of happiness. Therefore, it is the party committed to equal representation and opportunity for all and preservation of the rights of each individual. It is the purpose of this constitution to ensure that the party provides equal opportunity for full participation in our civic life for all Minnesota residents who believe in these principles regardless of age, race, sex, religion, social or economic status.

## ARTICLE I Name and Object

### SECTION 1: Name.

The name of this organization shall be Republican Party of Minnesota.

### SECTION 2: Object.

The object of the party shall be the maintenance of government by and for the people according to the Constitution and the laws of the United States and the State of Minnesota, and the implementation of such principles as may from time to time be adopted by party conventions. To obtain this object it is essential the party shall organize at all levels to elect Republicans to public office.

## ARTICLE II Membership and Dues

### SECTION 1: Membership.

The membership of the party shall be composed of all citizens of the State of Minnesota who desire to support the objectives of the party.

### SECTION 2: Dues.

Payment of dues shall not be required as a condition of membership.

### SECTION 3: Rights.

Nothing in this constitution shall be construed to deny or abridge the rights of any voter to participate in any party caucus, primary or convention, where he/she is entitled by law to participate.

## ARTICLE III Congressional and Legislative Reapportionment Committee

### SECTION 1:

In the first odd numbered year following reapportion the State Executive Committee shall establish a standing committee to develop an operating policy and procedure manual for the next reapportionment period.

### SECTION 2:

The reapportionment committee shall consist of a chair and one person from each Congressional

District. It is recommended that the appointee have actual Congressional District and/or Basic Political Organizational Unit (BPOU) leadership apportionment experience. The state party chair shall appoint the chair of the reapportionment committee. The Congressional District representative shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding appointment, by the Congressional District executive committee.

**SECTION 3:**

The reapportionment manual shall be prepared by the reapportionment committee and submitted to the Executive Committee for approval. The Executive Committee shall submit the reapportionment manual to the State Central Committee no later than January 1 of each census year.

**SECTION 4:**

Following the approval of the reapportionment manual by the Executive Committee and the State Central Committee, in all cases concerning reapportionment in which it is not in conflict with the constitution and bylaws of the Republican Party of Minnesota, the manual shall govern Congressional and Legislative reapportionment matters for the current reapportionment process.

**ARTICLE IV**  
**Delegation of Power**

**SECTION 1: Basic Unit.**

The party shall be organized into BPOUs, i.e., one of the following:

County, House District, or Senate District except that in any county containing four or more entire House Districts the county must organize as House or Senate Districts.

**SECTION 2: Organization.**

It shall be the responsibility of the BPOU committees to assist all endorsed Republicans seeking public office at least partly within their respective units, to expand the membership of the party within their respective units, and to organize or cause to be organized each ward, precinct, or other voting district in their unit. The form of enrollment shall be prescribed by the State Executive Committee and shall be uniform throughout the state. No qualifications for membership shall be imposed except as provided by this constitution. Opportunity for enrollment shall be open at all times to all voters who are eligible for membership under Article II.

**SECTION 3: Management.**

The management of the affairs of the party within each basic political organizational unit shall be vested in the BPOU committee, subject to the direction of state and Congressional District authorities as to matters within the scope of their respective functions.

**SECTION 4: Territorial Realignment.**

A county committee of a county containing fewer than four entire House Districts may disband the county organization and reorganize itself along either Senate or House District lines, by adding a portion of an adjoining county or allocating part of the county's territory to another BPOU. A county committee may also realign its territory by adding a portion of an adjoining county and/or allocating part of its territory to another BPOU. The procedure shall be by approval of at least 60% of the county convention of each of the involved counties, provided that notice of such proposal for reorganization was issued in the call of the convention. The county convention shall submit its transitional plans including proposed distribution of funds to accomplish such reorganization to the Congressional District and State Executive Committees for their review. The new organization shall have all of the rights and responsibilities of a BPOU. Such reorganization shall continue until the next state-wide reapportionment or until the county form of organization is restored by a convention of the precinct Delegates within the original county lines called by authority of the Republican Party of Minnesota State Executive Committee or any Republican

Party of Minnesota state convention. No BPOU that is organized as a County BPOU can be forced to reorganize as a House District or Senate District.

## ARTICLE V

### Conventions and Endorsements - General Provisions

**SECTION 1: Business and Call.**

- A.** Conventions shall transact such business as is specified in the call of the convention, and may transact such other business as a majority of the convention may determine, subject to the provisions of Article VIII, Section 2 of this constitution.
- B.** The call for a convention shall be issued at least ten (10) days prior to the convention, except that for an endorsing convention for a special election or for a post-primary endorsing convention, the call shall be issued at least five (5) days prior to the convention. Convention calls and reports required to be mailed prior to a convention may be issued electronically by email.

**SECTION 2: Registration.**

- A.** Notwithstanding Article II, Sections 2 and 3, registration fees may be assessed Delegates and Alternates attending a convention.
- B.** Once a Delegate or a seated Alternate has registered for the convention he/she remains part of the voting strength of the convention even if he/she leaves the convention prior to the convention's official adjournment.
- C.** A convention may close registration of Delegates and Alternates only if the convention call states the time at which registration will close. If the call states a registration closing time the convention may permit a later closing time for registration or may require the convention to remain open regardless of the language in the call.

**SECTION 3: Endorsements.**

**A. General Rules.**

- 1.** It shall first be determined by a majority vote whether endorsement shall be considered for an office.
- 2.** Voting on a candidate for endorsement for an office shall be by secret ballot. The convention or committee may decide by a two-thirds vote to endorse by a rising vote for any office for which there is only one candidate.
- 3.** Votes may be cast for any person who by law is eligible for election to the office under consideration and who is eligible under this constitution to seek the endorsement, even though he/she has not been nominated or has withdrawn from nomination. Ballots may also be cast stating 'no preference' or 'undecided', or indicating no endorsement. Blank ballots or abstentions, unintelligible ballots, ballots marked only 'U' or 'X', or ballots cast for an ineligible person or a fictional character shall not be included in determining the 60% vote needed for endorsement. No preprinted ballot shall be allowed unless options for 'no preference', 'undecided' and 'no endorsement' are included.
- 4.** A motion of no endorsement may be adopted by a majority vote. The rules of a convention may limit how often or when such a motion may be made. However on any round of voting for endorsement, a motion of no endorsement shall be considered adopted if a majority of the ballots (excluding blanks) or a majority of the votes on a voice vote (excluding abstentions) is for 'no', 'none' or 'no endorsement'.

5. Excepting the 60% requirement in this Article, BPOU constitutions may establish different rules of endorsement for conventions relating to legislative districts or other areas entirely within the BPOU.

6. An endorsement may carry with it the commitment of party resources, finances and volunteers only when made at a convention that is representative of the entire electorate for the office. In the case of a proposal for endorsement of a candidate whose constituency is not coterminous with the territory of the convention, only those Delegates residing within such constituency shall vote upon the proposal. An endorsement for public office at a convention below the level of the one that is representative of the entire electorate for the office shall be no more than an expression of the sentiment of the convention.

**B. Pre-Primary Endorsement.**

1. If the public office sought by the candidate is legally partisan, the candidate must agree prior to being considered for pre-primary endorsement to seek the office as a Republican if he/she receives the endorsement.
2. Any candidate for any elective public office may be granted pre-primary endorsement by any state, Congressional District, BPOU or other authorized convention if he/she receives a 60% vote of the convention and if the 60% is greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote.
3. Only one candidate may be endorsed per seat for a particular office.
4. When more than one candidate is nominated for endorsement for an office, none of the candidates for that office shall be voted upon separately.

**C. Rules for Minnesota Supreme Court and Minnesota Court of Appeals Endorsements.**

1. As to candidates for judicial office, the Republican Party of Minnesota shall at its state convention consider whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals. The nominations committee shall report, whether any candidate for endorsement has met the requirements of Article VI, Sec. 3.
2. After the report of the nominations committee, the state convention shall proceed to the vote on whether endorsement should be considered. The convention may only vote to endorse a candidate who has first satisfied the requirements of Article VI, Sec. 3.
3. If the state convention votes affirmative on consideration of endorsement, the Delegates shall vote on endorsement of a person for that particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals. Endorsement may be conferred upon any person who by law is eligible for election to the office and who is eligible under this Constitution to seek endorsement, even if such candidate has not sought endorsement by the Republican Party of Minnesota or has communicated that such candidate does not desire and/or will not use Republican Party of Minnesota endorsement.
4. Except where they conflict with the special rules stated in this paragraph, the provisions of Article V, Section 3, A. and B. apply to endorsing candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.

**D. Endorsement By State Central Committee.**

If a primary election for any Minnesota statewide office or for United States Senator results in the selection of a nominee other than the Republican-endorsed candidate, a meeting of the State Central Committee shall be called by the State Party Chair or by the State Executive Committee within five (5) days after the certification of the primary election results by the State Canvassing Board. The purpose of this meeting shall be to consider a post primary endorsement of the nominee(s) winning the primary election. Such a meeting may also consider post primary endorsement of a Republican nominee for any other statewide office or United States Senator for which no pre-primary endorsement was made. The State Party Chair

or the State Executive Committee may call a meeting of the State Central Committee at any time after the State Convention to consider Republican endorsement by the State Central Committee of any candidate for statewide office or for United States Senator, if (1) the State Convention did not endorse any candidate for that office and such candidate's candidacy for that office had not been announced prior to the State Convention or (2) the endorsed candidate dies, withdraws, or is otherwise ineligible for election to the office sought. Any endorsement by the State Central Committee shall require a 60% vote of the registered Delegates (including seated Alternates) at such State Central Committee meeting and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates at such meeting as established by the last report of the credentials committee preceding such vote.

#### **E. Vacancies In Nominations.**

In the event of the death or withdrawal of an endorsed nominee for statewide office prior to the primary, or in the event of the death or withdrawal of a candidate after the primary, but 21 days prior to the general election, the State Central Committee shall consider the endorsement of a substitute nominee or candidate. The call for the meeting shall be issued at least five days prior to the scheduled meeting. In the event the candidate withdraws or dies less than 21 days prior to the general election, the State Executive Committee shall consider endorsement of a substitute candidate. Any endorsement by the State Central Committee shall require a 60% vote of the committee and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote. Any endorsement by the State Executive Committee shall require a 60% vote of the committee and such vote must be greater than or equal to at least a majority of the members of the committee.

#### **F. Legislative District Endorsing Conventions.**

1. A legislative district endorsing convention wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
2. Where a legislative district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
3. Where a legislative district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
4. In the event that a majority of the precinct chairs from a legislative district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. F. 2. or 3. F. 3. of this Article, shall issue the call for such convention.
5. In the event that all of the BPOU committees from a legislative district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.
6. Eligible voters at legislative district endorsing conventions shall be the Delegates or their Alternates who reside within the legislative district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus.
7. Should the Delegates and Alternates qualified to vote at a legislative district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

#### **G. County and County District Endorsing Conventions.**

1. For a county containing four or more entire House Districts a county convention may be held solely for the purpose of endorsement for county offices elected on a countywide basis. A county district convention may be held solely for the purpose of endorsements for county offices such as County Commissioner if elected by districts.
2. If a county or county district office lies wholly within a BPOU, a county convention shall be called by the BPOU committee.
3. If a county or county district office crosses BPOU lines, but lies wholly within a Congressional District the convention may be called by the Congressional District Executive Committee unless otherwise provided for in the Congressional District constitution.
4. If a county office crosses BPOU and Congressional District lines, the convention may be called by the State Executive Committee.
5. Should a county or county district consist of more than one (1) BPOU, a request for a county convention must be submitted by the committees of a majority of the BPOUs to:
  - a. Congressional District Executive Committee, unless otherwise provided for in the Congressional District constitution, if a county lies wholly within a Congressional District; or
  - b. State Executive Committee, if the county office crosses Congressional District lines.
6. In the event that all of the BPOU committees from a county or county district office that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.
7. Eligible voters at a county or county district convention shall consist of those Delegates and Alternates who reside within a county or county district and who were duly elected at the most recent Republican Party precinct caucus held within the county or county district.
8. Should the Delegates and Alternates qualified to vote at the county or county district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.
9. For Hennepin County the Hennepin County subcommittee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor. For Ramsey County the Congressional District committee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor.

#### **H. City, Ward, Township, School Board, and Judicial District Endorsing Conventions.**

1. For cities, townships, and judicial districts not included in Article X, Section 4, a city, ward, township, school board, or judicial endorsing convention may be held for the purpose of endorsing candidates for city offices, township offices, school board, and judicial office and the provisions in Article V, Section 3, I, 1-9 shall only apply to such cities, townships and school districts.
2. An endorsing convention for such a city, ward, township or school district wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.

3. An endorsing convention for such a city, ward, township, school district, or judicial district wholly within a given Congressional District may be held subject to the provisions of said Congressional District constitution and/or bylaws, provided said provisions are not in

conflict with state statutes or the Republican Party of Minnesota State Constitution.

4. Where such a city, ward, township, school district, or judicial district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.

5. Where such a city, ward, township, school district, or judicial district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.

6. In the event that a majority of the precinct chairs from such a city, ward, township, school district, or judicial district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. I. 4. or 3. I. 5. of this Article, shall issue the call for such convention.

7. In the event that all of the BPOU committees from such a city, ward, township, school district, or judicial district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

8. Eligible voters at such city, ward, township, school district, or judicial district endorsing conventions shall be the Delegates or their Alternates who reside within the city, ward, township or school district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus held within the political boundaries of the legislative district.

9. Should the Delegates and Alternates qualified to vote at such a city, ward, township, school, or judicial district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

#### **SECTION 4: Seating of Alternates.**

Once the temporary organization has been established, the first order of business of a state or Congressional District convention shall be the seating of Alternates. The permanent voting roll of the convention shall be composed of the Delegates of each BPOU who actually are present, and in the absence of any Delegate to the convention, an Alternate shall be seated in his/her stead during his/her absence according to the procedure established by the constitution or bylaws of the BPOU. When a Delegate returns to the floor of the convention, he or she will be seated immediately.

#### **SECTION 5: Election and Terms of Delegates.**

A. All state, Congressional District, BPOU, and Delegates and Alternates shall be elected in general election years and shall hold office for a term of two years or until their successors are elected, or upon adoption in their respective BPOU constitution, they may elect Delegates and Alternates to the Congressional District and state conventions annually in the same manner as provided in the general election year, and these Delegates and Alternates elected under this option shall hold office for a term of one year, or until their successors are duly elected.

B. All affiliate Delegates and Alternates shall serve a two year term or until their successors are elected. An affiliate Delegate or Alternate may not be a regular party Delegate or Alternate to the same convention. Affiliate Delegates and Alternates to Congressional District conventions must reside in the Congressional District and must be elected by the affiliate members who reside in the Congressional District and will be legally qualified voters in the next general election.

C. In compliance with the rules of the Republican National Convention, no Delegate or Alternate may be an automatic Delegate or Alternate. Each Delegate or Alternate must be elected by his/her respective convention. Delegates and alternates to the Republican National Convention may be bound to cast his/her vote for a particular candidate. The state executive committee will have the authority to create binding rules for the state and congressional districts. The rules will be in accordance with rules promulgated by the Republican National Committee.

#### **SECTION 6: Vacancies.**

At all levels within the party a vacancy shall occur in a Delegates position upon his/her death, resignation or removal from the geographical area from which he/she was elected, or upon the failure of the body having the power of election to fill such position, if no duly elected Alternate is available to fill the vacancy. Vacancies shall be filled in the same manner as the original Delegate or Alternate was elected.

#### **SECTION 7:**

Nothing in this Article is intended to affect the right of the convention to authorize, by rule, the Delegates present to vote the entire voting strength of the BPOU.

### **ARTICLE VI State Convention**

#### **SECTION 1: Composition.**

State conventions shall be composed of the following:

A. Delegates from various BPOUs of the state who are elected at their conventions. The number of Delegates from the various BPOUs shall be apportioned among the BPOUs upon such basis as the State Executive Committee or the State Central Committee may determine, provided that the basis of apportionment shall be uniform throughout the state, and shall be based upon the vote for the Republican candidate for Governor in the last preceding statewide general election; or, if such election were a presidential election, the vote cast for the Republican candidate for President. If the number of Delegates apportioned to a BPOU is less than two, the total number of Delegates shall be increased to a minimum of two Delegates for each BPOU.

B. Subject to Article V, Section 5, B., two Delegates and two Alternates elected by each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.

#### **SECTION 2: Committees.**

State convention committees consisting of a platform committee, a rules committee, a credentials committee, a nominating committee and such other state convention committees as may be necessary or desirable shall be organized. Members in each committee shall be appointed as follows:

A. An equal number of members from each Congressional District to be appointed by the district chair(s) of the respective Congressional District.

B. Members at large to be appointed by the state party chair, the number of which is not to exceed

15% of the total membership of any committee.

C. A chair to be appointed by the state party chair.

**SECTION 3: Nominations Committee.**

A. To be eligible to be considered for endorsement or election, candidates for statewide endorsement and candidates for National Delegate or Alternate must meet all legal requirements and submit nominating petitions to the Nominating Committee containing the printed names and signatures of a minimum of 2% of the State Convention Delegates.

B. The Nominations Committee shall report to the convention those candidates who have met the petition and legal requirements at Section 3A and whether the Nominating Committee deems the candidates to be qualified or unqualified to receive endorsement or be elected.

**SECTION 4: Rules Committee.**

The Rules Committee report shall be mailed at least seven (7) days in advance of the convention.

**SECTION 5: Platform Committee.**

A. The function of the platform committee shall be to maintain a permanent platform for the Republican Party of Minnesota based upon the platform adopted at the previous regular Republican State Convention. The permanent platform may only be amended as provided in this constitution and the rules of the state convention. The committee will be responsible for performing the work described in subsection C. below.

B. The platform committee shall meet in even numbered years at the call of its chair or the state party chair. The final committee report shall be presented to the state party chair and be mailed to convention Delegates and Alternates at least seven (7) days prior to the state convention. The committee shall then present the final committee report to the state convention to be voted on in the manner prescribed by this constitution and the rules of the convention.

C. In even numbered years the platform committee shall review the permanent platform and all of the resolutions passed at Congressional District conventions for Congressional Districts that have a representative on the platform committee and any additional resolutions brought to the committee in the manner prescribed by the state convention rules. The committee shall determine which resolutions are new resolutions (i.e., address issues that are not addressed in the current permanent platform). The committee will recommend to the state convention the following changes:

1. Adoption of the new resolutions identified by the committee;
2. Renewed adoption of any resolution of the platform designated to sunset;
3. Elimination of those resolutions that are no longer germane;
4. Combining those resolutions that are similar;
5. Clarifying those resolutions that are confusing;
6. Reconsideration of those resolutions that are in conflict with other resolutions; and
7. Any resolution submitted by a majority of Congressional Districts shall be included in the platform committee final report.

The Committee has discretion to make recommendations to the state convention to limit the size of the platform including a recommendation to designate resolutions of the platform for sunsetting.

**D.** All motions related to the platform committee report shall be voted upon at the state convention in the manner prescribed in the convention rules and need to be adopted by a minimum of sixty (60) percent of the last credentials report.

**E.** The creation of a permanent platform for the Republican Party of Minnesota will not limit the authority of any BPOU or Congressional District with respect to adopting their own platform.

**SECTION 6: Time and Place of Convention.**

A state convention of the party shall be held in each general election year as required by Minnesota State Statutes, at such time and place as the State Central Committee may determine. Special state conventions may be called at such other times and places and for such purposes as the State Central Committee may determine.

**SECTION 7: Issues Conference.**

In odd-numbered years the State Central Committee may organize a conference of party activists for the purpose of studying issues of topical interest to the Party. The conference shall be open to all interested Republicans and shall not be limited to State Convention Delegates and Alternates.

**SECTION 8: Presidential Electors.**

**A.** Presidential Electors shall be nominated by the State Convention in the year of each Presidential election as follows: (i) two (2) Presidential Electors shall be nominated at-large by the State Convention Delegates in accordance with the rules of the State Convention; and (ii) each Congressional District shall place in nomination one (1) Presidential Elector (a Congressional District Elector-Nominee) as provided in Article VII, Section 3, who shall be nominated by the affirmative vote of the State Convention, in accordance with the Rules of the State Convention.

**B.** Each Congressional District shall report to the State Convention the name of that Congressional District's Congressional District Elector-Nominee in the manner provided in the Rules of the State Convention.

**C.** If a Congressional District fails to select a Congressional District Elector-Nominee or a Congressional District Elector-Nominee is unable or unwilling to serve as a Presidential Elector prior to being nominated by the State Convention, a substitute Congressional District Elector-Nominee shall be placed in nomination in accordance with the Constitution or Bylaws of the Congressional District. If no provision exists in the Congressional District's Constitution or Bylaws for a substitute Congressional District Elector-Nominee, the Presidential Elector to be placed in nomination by that Congressional District shall instead be nominated by the State Convention Delegates in the manner provided for an at-large Presidential Elector as set forth above.

**D.** No person shall be nominated a Presidential Elector unless that person has been selected as a Congressional District Elector-Nominee or nominated at-large as provided herein.

**E.** If any Presidential Elector that has been nominated by the State Convention is unable or unwilling to serve after the state convention, the state executive committee shall nominate a replacement from the geographic body that nominated the original Presidential Elector.

**ARTICLE VII**  
**Congressional District Conventions**

**SECTION 1: Composition.**

Congressional District conventions shall be composed of the following residents of the district:

**A.** Delegates apportioned to and elected at the BPOU convention, in the same manner as Delegates to state conventions.

Any BPOU that crosses Congressional District lines shall allot its apportioned Delegates to the Congressional Districts using the Republican vote cast for either Governor or President in the most recent general election. The manner of election shall be determined by the BPOU constitution, bylaws or by a motion of its convention.

**B.** Subject to Article V, Section 5, B., one Delegate and one Alternate who are residents of the Congressional District elected at a Congressional District caucus held by any of the statewide affiliate organizations as listed in the party bylaws, provided that the affiliate has at least ten eligible members residing in the Congressional District.

**SECTION 2: Time and Place of Convention.**

Congressional District conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, or the committees of the respective Congressional District, and at such other times and for such other purposes as the committee calling the conventions may determine. The Congressional District committee shall determine the place of holding Congressional District conventions in each district.

**SECTION 3: Presidential Elector Nominees.**

**A.** In each Presidential election year, each Congressional District shall be entitled to place in nomination one (1) person to be that Congressional District's Congressional District Presidential Elector-Nominee. A Congressional District Presidential Elector-Nominee may be selected by: (a) the affirmative vote of the Congressional District's Delegates at the Congressional District Convention held in a Presidential election year in accordance with the rules of the District Convention; or (b) by that Congressional District's District Convention Delegates in the manner provided in the Congressional District's constitution.

**B.** Each Congressional District Elector-Nominee shall be reported to the State Convention and nominated by the State Convention as provided in Article VI, Section 8 of this Constitution.

**ARTICLE VIII**  
**Basic Political Organizational Unit Conventions**

**SECTION 1: Composition.**

BPOU conventions shall be composed of the following residents of the BPOU:

Delegates elected at the precinct caucuses that are held in each precinct every general election year as required by Minnesota statutes. The number of Delegates and Alternates at each convention and the basis of their apportionment shall be determined by the BPOU committee, provided that such basis shall be uniform throughout the BPOU and shall be based on the vote cast for the Republican candidate for Governor in the past preceding statewide general election; or if such election were a presidential election, the vote cast for the Republican candidate for President. Special caucuses for one or more precincts may be called by the BPOU committee in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies in precincts where such exist at the time of notice.

**SECTION 2: Time and Place of Convention.**

BPOU conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, the State Central Committee, the Congressional District committee or the BPOU committee. The conventions shall precede Congressional District and state conventions. Special BPOU conventions may be held at the call of the State Executive Committee, the State Central Committee, the Congressional District committee, or the BPOU committee at such time and for such purpose as the committee calling the same may determine. BPOU conventions shall be held at a place determined by the respective committee issuing the call.

**SECTION 3: Delegates and Alternates to State and Congressional District Conventions.**

Delegates and Alternates to the Congressional Districts and to state conventions shall be elected at the BPOU conventions in even numbered years; or if provided in the BPOU constitution may be elected annually. A BPOU may elect up to twice as many Alternates as the number of Delegates allotted, provided that the BPOU convention or constitution specifies a method for the orderly seating of said Alternates to fill vacancies in the delegation. The qualifications to be elected a Delegate or Alternate are residence in the electing unit and being a legal and qualified voter in the next general election. All disputes concerning the seating of Alternates shall be settled according to that BPOU's constitution or bylaws. If seating of Alternates is not addressed in the BPOU's constitution or bylaws, then a caucus of the Delegates from that BPOU will meet to settle the issue.

## ARTICLE IX

### State Party Administration

**SECTION 1: State Central Committee.****A. General Management.**

The general management of the affairs of the party in the state shall be vested in the State Central Committee, subject to the control of the state convention and this constitution.

**B. Composition.**

The State Central Committee shall consist of the following:

**1. The Members of the State Executive Committee and the Congressional District Chairs.**

Where the Congressional District constitution provides for one chair and one deputy chair instead of two chairs, the chair and the deputy chair will be members of the State Central Committee. The Congressional District chairs and Congressional District representatives to the State Executive Committee may appoint a designee to serve in their absence provided that the designee is either a State Central Committee Alternate or Congressional District officer from his/her Congressional District. The state party officers, the national committeeman and committeewoman, and the state finance chair may appoint a designee to serve in their absence provided that the designee is a State Central Committee Alternate or Congressional District officer.

**2. One Delegate-at-large from each Congressional District.**

If a Congressional District constitution provides for a Congressional District representative to the State Executive Committee other than a Congressional District chair, then this person will be the Congressional District Delegate-at-large. If a Congressional District constitution provides that a chair will represent the Congressional District on the State Executive Committee, then the Congressional District shall elect in accordance with its constitution a Delegate-at-large and an Alternate in odd numbered years from within the Congressional District.

**3. One Delegate and one Alternate, elected from each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.**

**4. 300 Delegates and up to three times as many Alternates apportioned among the Congressional Districts, determined by the ratio of each Congressional District's Republican vote in the last general election for President or Governor. Congressional Districts shall further apportion all of their Delegates to their BPOUs, and no BPOU or portion thereof may be disenfranchised. The Congressional District shall determine the method for ensuring enfranchisement. Nothing herein shall be construed to require that every BPOU fragment qualify for its own Delegate or Alternate.**

The Delegates and Alternates shall be elected in odd numbered years from within the Congressional District in accordance with the provisions of the Congressional District constitution. A Congressional District Delegate or Alternate elected pursuant to this section shall serve a two year term commencing on the date of his/her election

and terminating on the date his/her successor is elected. Such Delegates and Alternates must reside in the Congressional District and be eligible to be a legally qualified voter in the next general election.

In the event that any Congressional District Delegate and one of his or her Alternates are unable to attend a meeting of the State Central Committee, the Congressional District constitution shall provide for a procedure for appointment of a replacement from among the other Alternates elected in that Congressional District.

A vacancy in a Congressional District Delegate position shall be filled for the unexpired term by one of his or her Alternates if any, otherwise a vacancy in a Delegate or Alternate position may be filled for the unexpired term by the respective body of officers having power of appointment or election.

**5.** Each Republican state constitutional officer and each Republican member from Minnesota of the United States Senate or the House of Representatives, or his/her appointee, shall be a member of the State Central Committee for the duration of his/her term of office.

**6.** The Speaker of the Minnesota House of Representatives, if a member of the Republican Caucus or his/her appointee (otherwise the leader of the House Republican Caucus or his/her appointee) and the leader of the Republican Caucus in the Minnesota State Senate or his/her appointee.

**SECTION 2: State Executive Committee.**

**A. Composition.**

The State Executive Committee shall consist of the following:

1. The state chair, deputy chair, secretary and treasurer;
2. The national committeeman and committeewoman;
3. One district chair from each Congressional District or a Congressional District representative as provided for in the Congressional District constitution or bylaws who shall serve until a successor is elected;
4. The state finance chair.

**SECTION 3: State Party Officers.**

*[Prior to the election of a Chair in 2013, the positions of Secretary and Treasurer shall remain as one position.]*

**A. Composition.**

The state party officers shall consist of the following:

1. Chair
2. Deputy chair
3. Secretary
4. Treasurer

**B. Elections, Terms and Removals**

1. The State Party Chair, Deputy Chair, and Secretary shall be elected at large by the State Central Committee in accordance with the bylaws or upon the occurrence of a vacancy, as provided in clause 4 below.
2. At the first Executive Committee meeting after the election of a Party Chair or in the event of a vacancy in the Treasurer position, the Executive Committee shall elect a Treasurer by a 2/3 majority vote of the full membership of the Executive Committee. The

Treasurer cannot simultaneously hold any other state party officer position.

**3.** State party officers shall not serve more than four (4) consecutive full terms in the same office. Unless otherwise provided, each party officer shall serve a two year term in accordance with the procedures established in the bylaws.

**4.** (i) Any state party officer may be removed by a two-thirds vote of the full membership of the State Executive Committee and confirmation by a vote of a simple majority of those present at the next meeting of the State central Committee. This party officer's position shall be considered vacant until the next State Central Committee meeting (ii) Any state party officer may be removed by a two-thirds vote of those present at any meeting of the State Central Committee.

**5.** In the event of a vacancy in the office of state chair, the deputy chair shall carry out the duties of the chair until a new state chair is elected and the State Central Committee shall meet within forty-five (45) days thereafter to elect a new state chair. In the event of a vacancy in the office of deputy chair, secretary, or treasurer, the state chair may appoint

an acting deputy chair, secretary, or treasurer subject to ratification by the State Executive Committee within thirty days after the appointment, to carry out the duties of the vacant office until a new officer is elected. The State Central Committee shall elect a new deputy chair or secretary at its next regularly scheduled meeting or, if such meeting is scheduled within thirty days after the vacancy occurs, at the second regularly scheduled meeting after the vacancy occurs.

**SECTION 4: General Provisions Relating to State Party Administration. A.**

**Terms of Appointees.**

Unless otherwise provided, persons appointed by a state party officer under this constitution shall have terms of office expiring with the expiration of the term of the appointing officer. Each such person may be removed at the discretion of the appointing officer. In the case of the death, removal from office or geographical area, or resignation of the appointing officer the persons appointed by such state party officer shall have terms expiring with the election by the State Central Committee of the new state party officer.

**B.** No state party officer shall hold his or her office and at the same time receive monetary or inkind payment from any candidate or its campaign.

**C.** The state chair and deputy chair shall meet with the Congressional District chairs as a group at least once every three months.

**ARTICLE X**  
**Congressional District Party Administration**

**SECTION 1: Congressional District Committee. A.**

**Duties and Responsibilities.**

The management of the affairs of the party pertaining to each Congressional District shall be vested in the Congressional District committee of such Congressional Districts, subject to the direction of the State Central Committee, the State Executive Committee, and the Congressional District convention, provided that the Congressional District committee shall have no jurisdiction over local affairs within the respective BPOUs in the Congressional District.

**B. Composition.**

The composition of each Congressional District committee shall be provided in their respective Congressional District constitution and/or bylaws.

**C. Officers.**

The officers of each Congressional District committee shall be at least one chair, a treasurer and such additional officers as may be determined by each Congressional District constitution and/or bylaws.

**D. Election of Officers.**

The Delegates to each Congressional District convention held in odd numbered years shall elect the officers of the Congressional District committee from any members of the party residing within the district.

**SECTION 2: Congressional District Executive Committee.**

The Congressional District Executive Committee shall consist of the officers of the Congressional District committee and such additional members as provided by the respective Congressional District constitution and/or bylaws.

**SECTION 3: Removals.**

Unless a Congressional District constitution or bylaws provide otherwise, any officer of a Congressional District committee, or any member of the Congressional District Executive Committee, may be removed by a two-thirds vote of those committee members present at the Congressional District or Congressional District Executive Committee meeting, as applicable.

**SECTION 4: City Committees.**

For cities of the first class (and for cities located wholly within Hennepin County having a population of 75,000 or more), it shall be responsibility of the respective Congressional District committee to organize or cause to be organized such cities and wards thereof, located within their Congressional District, for city elections. The Congressional District committee may determine the number of Delegates and Alternates for such a city or ward convention and the basis of their apportionment, provided that such basis shall be uniform throughout the city and the wards thereof, and if such Delegates and Alternates are elected at the precinct caucuses held in even numbered years the apportionment shall be based on the Republican Party vote in the last general election for President or Governor. The constitution and/or bylaws of the respective Congressional District shall provide for the establishment of a city committee for such a city. A Congressional District may also give power and responsibilities to such a city committee, including the authority to elect officers and to call endorsing conventions for city office, subject to the provisions of the Congressional District constitution and/or bylaws.

**ARTICLE XI**  
**Basic Political Organizational Unit Administration**

**SECTION 1: BPOU Committee.**

**A. Composition.**

The BPOU committee shall consist of the BPOU party officers and such other members as the BPOU constitution, bylaws, or convention may prescribe.

**B. Officers.**

The officers of each BPOU shall be at least one chair and such additional officers as may be determined by each BPOU constitution and/or bylaws.

**C. Election of Officers.**

The officers and other members of the BPOU committee shall be elected at each BPOU convention held in odd numbered years.

**D. Management and Fundraising.**

The management of the affairs of the party within the BPOU shall be as set forth in Article IV. Organizers or other representatives of state or Congressional District authorities shall not solicit membership or funds at an event held within any BPOU without at least 14 days written prior notice to the BPOU chair(s). (See Article IV, Section 2.)

**SECTION 2: BPOU Executive Committee.**

The BPOU convention may provide for a BPOU executive committee of such size as it deems proper, which shall be members of the BPOU committee.

**SECTION 3: Removals.**

Unless a BPOU constitution or bylaws provide otherwise, any BPOU representative on a Congressional District committee, or officer of a BPOU executive committee may be removed by a two-thirds vote of those members present at a BPOU committee meeting.

**SECTION 4: Vacancies in Precinct Offices.**

The BPOU chairman or chair with the approval of the BPOU committee may call a special caucus, for one or more precincts, in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies where such exist at the time of notice, or may provide for the appointment of an acting officer until an officer is duly elected.

## **ARTICLE XII** **Judicial District Organization and Administration**

**SECTION 1:**

A Judicial District convention may create and organize a Judicial District Committee. A notice of intent to consider forming a Judicial District Committee shall be included in the call of the convention along with the proposal to consider endorsement. If such committee is created and organized, it shall be strictly auxiliary to the Republican Party of Minnesota and shall have no other powers except as provided herein. If a Judicial District Committee is formed, it shall search for candidates for judicial office. If a convention endorses for a judicial office under Article V, Section 3(H), the Judicial District Committee shall be responsible to secure the election of the endorsed candidate.

## **ARTICLE XIII** **National Committeeman and Committeewoman**

**SECTION 1: Selection of National Committeeman and National Committeewoman.**

In the year of each presidential election, immediately before or immediately after the state convention that precedes the Republican National Convention, the State Central Committee shall meet and select a national committeeman and a national committeewoman.

## **ARTICLE XIV** **Affiliates**

**SECTION 1: Purpose and Organization.**

The right of special organizations having Republican affiliations to exist and carry on their activities as they see fit, consistent with the object, platforms, and principles of the party shall be recognized. The organization of permanent local clubs and organizations of party members for the purpose of holding meetings and carrying on other activities in furtherance of party and public welfare shall be permitted and encouraged. The activities of all such organizations during the election campaigns shall be coordinated with authorized party activities and subject to the direction of the regularly constituted party organizations.

**SECTION 2: Procedures for Determining Affiliate Status.****A. Organizational Requirements for Affiliate Status.**

Each Organization applying to be recognized as an Affiliate Organization of the Republican Party of Minnesota shall submit to the State Party Chair a copy of its constitution, bylaws, any other governing documents and an Executive Officer roster of the organization. The organization shall hold a convention at least bi-annually to elect officers and delegates/alternates as applicable.

Unless otherwise provided in the organization's constitution and/or bylaws, such convention shall be subject to the requirements in Article V.

**B. Procedures for Determining Affiliate Standing.**

The State Executive Committee shall review all affiliates' standing on a yearly basis. Written notice must be sent to the presiding officer of the affiliate no later than twenty (20) days prior to a State Executive Committee meeting at which the affiliate's standing will be reviewed. The State Executive Committee shall annually forward its recommendation of affiliates in good standing to the State Central Committee to be certified by the State Central Committee.

**SECTION 3: Representation at State and Congressional District Conventions**

Authorized statewide Affiliates shall be entitled to voting representation at Republican State Conventions in accordance with Article VI, Section 1, B. Authorized statewide Affiliates may be entitled to voting representation at Congressional District Conventions, subject to qualification, in accordance with Article VII, Section 1, B.

**ARTICLE XV**  
**Constitution and Bylaws, Committee and Amendments**

**SECTION 1: Constitution and Bylaws Committee.**

The Constitution and Bylaws Committee shall consist of a chair, and two persons from each Congressional District. The state party chair shall appoint the chair of the Constitution and Bylaws Committee. The Congressional District representatives shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding the appointment, by the Congressional District Executive Committee.

The Constitution and Bylaws Committee shall give consideration to and may propose appropriate amendments and/or revisions of the Constitution to the state convention. The Constitution and Bylaws Committee shall also give consideration to and propose appropriate amendments of the bylaws to the State Central Committee. One third of the committee members shall constitute a quorum.

Any member of the Constitution and Bylaws Committee shall have the privilege of addressing the state convention or the State Central Committee when any report of the Constitution and Bylaws Committee is being considered.

**SECTION 2: Amendments to the Constitution.**

This constitution may be amended by a majority vote at any state convention, provided that any proposal for amendment shall be referred to the state Constitution and Bylaws Committee and reported out of said committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the convention.

**SECTION 3: Bylaws.**

The State Central Committee and State Executive Committee shall operate under such bylaws as are deemed necessary for the transaction of the business of the party. The bylaws shall contain the specific delegation and division of responsibilities and duties among the various departments of the state organization and may specify whatever rules and administrative procedures the State Central Committee deems necessary.

**SECTION 4: Amendments to the Bylaws.**

The bylaws may be amended by a two-thirds (2/3) vote at any State Central Committee meeting after written notice of any proposal for amendment has been submitted with the notice of the meeting. Any proposal for amendment shall be referred to the state Constitution and Bylaws Committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the State Central Committee Meeting.

**ARTICLE XVI**  
**General Provisions**

**SECTION 1: Other Constitutions and Bylaws.**

Any body within the party organization may adopt and amend a constitution and/or bylaws for its own government not inconsistent with this constitution.

**SECTION 2: Removals.**

Notice of every proposal for removal by any committee or other body of the party shall be included in the notice of the meeting, and the individual concerned shall be served with a detailed statement of the charges against him/her at least ten days prior to such meeting.

**SECTION 3: Vacancies.**

A. All vacancies shall be filled for the unexpired term by the respective bodies or officers having power of election or appointment, except officers or members of the Congressional District or BPOU committees that shall be filled by such committees.

B. A vacancy shall occur upon the death or resignation of an officer or committee member or upon his/her removal from the geographical area from which he/she was elected.

**SECTION 4: Financial Data/Congressional District/Basic Political Organizational Unit, and Legislative District Budgets.**

A. Upon request by the state party treasurer, the financial officer of any organization recognized under this constitution including but not limited to each Congressional District, each BPOU/Legislative District organization and affiliate shall prepare biennial budgets or submit financial data pertaining to the organization for review and shall submit financial data to the state party treasurer.

B. The party treasurer shall report at least semiannually on the financial status of the state party to members of the State Central Committee.

C. All money received in the name of the Republican Party of Minnesota shall be deposited in its account. All money received shall be reported by the state party treasurer along with copies of any reports required by state or federal law.

D. No contribution shall be accepted and a unit of the party shall make no expenditure at a time when the office of treasurer of the respective unit is vacant.

**SECTION 5: Improper Use of Party Funds.**

No loan, in any form, may be made to any individual or party officer. In the event that any party officer, at any level of the Republican Party of Minnesota, converts to his/her own use any Republican Party funds, other party officers shall report such occurrence to the Chair of the Republican Party of Minnesota, diligently encourage and assist all law enforcement personnel in prosecuting the violator to the full extent of the law and shall work diligently to recover the misappropriated party funds.

**ARTICLE XVII**  
**Parliamentary Authority**

The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the party in all cases to which they are applicable and in which they are not inconsistent with the constitution and bylaws of the Republican Party of Minnesota, the statutes of the State of Minnesota, or any special rules of order the party may adopt.

Amended May 2016

**EXHIBIT 10**

# **Judicial Election Committee Minority Report**

**By David Asp & Harry Niska**

We dissent from both:

- The JEC majority's decision to withhold important information from the convention regarding Michelle MacDonald's qualifications as a candidate; and
- The JEC majority's decision to recommend Michelle MacDonald for endorsement.

## **I. The JEC again withheld important information from the Convention.**

- The JEC met with MacDonald for more than 2 hours to discuss her candidacy. During that meeting, MacDonald's responses to questions raised many concerning facts that could be damaging both to the candidate and the party.
- **But the majority on the JEC voted not to disclose any of those facts in its majority report. In fact, the majority actually took a formal vote not to inform the convention that MacDonald filed a legal complaint against the Republican Party in 2014 and was unwilling to commit not to bring such a complaint in the future.**
- The JEC's decision to withhold important information from convention delegates harkens back to 2014, when the JEC failed to disclose several relevant facts before MacDonald was endorsed. We hoped JEC would act in a more transparent manner in 2016. We were disappointed.
- The JEC's refusal to provide delegates with a complete picture of the controversies surrounding MacDonald is detrimental to the party and the party's process for endorsing candidates.

## **II. The JEC should not have recommended Michelle MacDonald for endorsement.**

- **Endorsing MacDonald will bring harm to the party**
  - As was the case in 2014, there is (and will be) extraordinary opposition by Republicans to this candidacy, and an endorsement will result in division.
  - In 2014, MacDonald filed a frivolous OAH complaint against the party that was thrown out as not legally founded. In our interview and follow up written questions, MacDonald was asked to rule out ever suing the party again. She would not do so; instead MacDonald said she did not “desire” to sue to the party.
- **MacDonald is not qualified and would not be an effective judge**
  - Delegates should expect higher qualifications of a candidate than the minimum qualifications of having a law degree. Potential judges and justices should have demonstrated expertise, legal skill, and be able to effectively and persuasively defend their judicial philosophy.
  - We do not believe MacDonald can articulate or defend her judicial philosophy. Although MacDonald claims to be an “originalist,” she was unable to explain why or explain what an “originalist” judicial philosophy means.
  - During the interview, MacDonald failed to articulately discuss any constitutional views beyond buzzwords and headlines. For example, she asserted that she had a difference of opinion with Justice Hudson on the First Amendment that she planned to make an issue in the campaign, but when asked to explain, she was not able to articulate this supposed difference.
  - When asked for examples of her legal work, MacDonald submitted samples of written briefs. The briefs propounded dubious constitutional theories, including expansion of substantive due process beyond the scope of current law.
    - In particular, she argued in an amicus brief to the Minnesota Supreme Court that the US Constitution prohibits Minnesota state courts from issuing no-contact orders with children. It is important

to note that this amicus brief was on behalf of her own non-profit organization, so she was not simply representing a client's private interests, she was choosing to advocate for this legal position.

- This argument is legally dubious, and profoundly opposed to conservative jurisprudence, by asserting that federal law ties the hands of the states in family law -- a quintessential state issue -- and by embracing, and attempting to extend, the doctrine of substantive due process.
- **MacDonald has demonstrated a lack of appropriate judicial temperament**
  - In at least three incidents, in publicly available video, she has demonstrated a volatile and confrontational temperament
    - Detained in Dakota County court for disobeying court officers
    - Stopped for DUI
    - 2014 MNGOP State Fair booth incident
  - MacDonald has repeatedly shown a lack of respect for law enforcement and judges.

### ***Our recommendations***

- **On question of considering judicial endorsements:** Because only one candidate is seeking an endorsement, and we believe that an endorsement of that candidate is imprudent, we recommend a **No vote** on this question.
- **On question of endorsing Michelle MacDonald for Minnesota Supreme Court:** If the initial motion passes and judicial endorsements are considered, we recommend voting **No endorsement** on the question of endorsing for Minnesota Supreme Court.

[election.startribune.com](http://election.startribune.com)



**StarTribune**

wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

### **Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- 

**More information:** Candidate website

*The information on this page was provided by the candidate.*

State of Minnesota  
Office of Administrative Hearings  
PO Box 64620  
St. Paul, MN 55164-0620

Docket No. 71-0320-33929

Complaint for violation of the Fair Campaign Practices Act  
Minn. Stat. § 211B.02 (2016)

Memorandum of Complainants in support of  
of a Probable Cause Finding

Together with this memorandum, Complainants submit five exhibits they intend to offer at a plenary hearing on this matter.

Exhibit 1 – Candidate profile of Michelle L. McDonald published on the website of the Star Tribune newspaper with information supplied by the Respondent, Michelle L. MacDonald

Exhibit 2 – Constitution of the Republican Party of Minnesota applicable during the 2016 state convention of the party

Exhibit 3 – Constitution of the Republican Party of Minnesota as changed and adopted by the 2016 Republican Party state convention

Exhibit 4 – A minority report of the judicial election committee of the Republican Party of Minnesota offered to the 2016 state convention

Exhibit 5 – Endorsement section of the Star Tribune’s candidate profile after redaction of the endorsement of the “Judicial Selection Committee”

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Your Complainants filed a complaint asserting that the Respondent Michelle A. MacDonald supplied false and misleading information to the Star Tribune newspaper that it included in its voter guide, published on the Star Tribune’s website. The information included a claim that the Respondent was endorsed by the “Judicial Selection Committee” of the Republican Party of Minnesota in 2016. (Timmer Ex. 1)

This statement is false for at least a couple of reasons. First, no such committee has ever existed in the Republican Party of Minnesota. Second, the committee that did exist, referred to as the “judicial election committee” in the constitution of the Republican Party, had no power of endorsement. (Timmer Ex. 2) It most certainly did not endorse the Respondent Michelle L. MacDonald in 2016.

In fact, after declining to endorse the Respondent Michelle L. MacDonald, the entire convention decided to abolish the “judicial election committee,” requiring that thereafter any judicial candidate seeking endorsement pass through the ordinary nominations committee process, and amended the constitution to do that. (Timmer Ex. 3)

The statements of the Respondent are in clear contravention of Minn. Stat. § 211B.02 (2016); the prospects of misleading the electorate are manifest. Section 211B.02 states:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit [e.g., a BPOU] or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

As cited in the complaint, this case is on all fours with *Niska v. Clayton* (aff'd as to the § 211B.02 claim), No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10, 2014). No further citation is really necessary; *Niska v. Clayton* involved the same political party, the same office sought for endorsement, and the same misleading claim of support by the Republican Party. The similarity is striking. In Section 3 of the Court of Appeals decision, on an appeal from a decision of the Office of Administrative Hearings finding a violation of § 211B.02, the Court said:

Clayton's [the Respondent in the OAH] next argument is that the panel did not receive substantial evidence that he violated section 211B.02. He appears to assert that the ALJ panel erred by concluding that his actions constituted a false endorsement. A person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party. See *In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms “DFL” and “LABOR ENDORSED” on campaign materials violated the statute); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979) (finding the use of the initials “DFL” would falsely imply endorsement or support). Clayton used the term “Republican Party of Minnesota” on multiple documents and on his website while promoting candidates who lacked the party's endorsement. Clayton attended the state Republican convention and knew that

the party had not endorsed his preferred candidates. The ALJ panel had ample evidentiary support for its finding that his actions knowingly and falsely implied that the RPM endorsed the candidates.

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In the present case, the Respondent MacDonald attended the 2016 state Republican convention and interviewed with the judicial election committee (which, as written earlier, was abolished later at the same convention), seeking endorsement, not by the committee, but by the convention. The committee did recommend Michelle MacDonald as eligible for endorsement, on a split vote; the dissenters issued a minority report. (Timmer Ex. 4)

Respondent MacDonald knew this process very well, having been through it in 2014 and present at the convention in 2016. She also recounted what happened in an interview with Alpha News:

Michelle MacDonald: "I am not Republican endorsed this year"

- Time 7:13: "The Republican Party decided not to endorse judges, not specifically me, but that was the undertone...[cross-talk]...I am not Republican endorsed this year."

[Source: Fletcher Long interview with Michelle MacDonald, "The Long Version", October 5, 2016, accessed via podcast on October 23, 2016. Link: <http://longversionw4j.com/podcasts/>]

Michelle MacDonald acknowledged committee only "recommend[ed] her for endorsement":

- Time 3:35: "But ultimately, after my interview, and after I submitted all kinds of papers, this entire committee said 'we are going to recommend her for endorsement."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with MacDonald on May 21, 2016

Michelle MacDonald: "I still have the support of the true Republican Party":

- Time 7:52: "Well, I'm still running for Minnesota Supreme Court. I still have the support of the true Republican Party, which are not necessarily the delegates, which I would have gotten support of if I had been able to speak. But the people, the people of Minnesota who elect the delegates."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with MacDonald on May 21, 2016. Link: <http://alphanewsmn.com/delegates-mngop-convention-choose-no-endorsement-michelle-macdonald/>]

Because of the minority report (Timmer Ex. 4), we know that Respondent MacDonald's statement that the "whole committee" recommended her is not true. And she continued to claim the support of the Republican Party, and "true Republicans," although it is difficult to see how a convention, comprised entirely of elected delegates, could not be true Republicans, or real ones, anyway.

After the candidate profile was published (Timmer Ex. 1), the Star Tribune was contacted by multiple people, including *inter alia*, Complainant Steve Timmer. The claim of endorsement by the fictitious Judicial Selection Committee was removed; this was done, on information and belief, after contacting Respondent MacDonald. (Timmer Ex. 5) The removal was not on the initiative of the Respondent, but rather by others and the editors of the Star Tribune newspaper. Respondent MacDonald has issued no clarification or retraction of the claim, at least of which your Complainants are aware.

o O o

It is clear beyond argument that the Respondent Michelle MacDonald caused false and misleading information to be published and disseminated by the largest circulation newspaper in Minnesota. Your Complainants do not have viewer statistics for the voter guide, but it must number in the thousands.

In the words of the OAH's penalty matrix, the Respondent's conduct was deliberate and unapologetic. And the statute, Minn. Stat. § 211B.02 (2016), and the recent authority under it, *Niska v. Clayton*, are clear. The conduct was clearly willful.

And it was grave, too. In the words of the matrix, it had at least "some impact on several voters," and is "difficult to correct/counter."

Apart from any penalty imposed, the declaration by the Office of Administrative Hearings that the Respondent's communication was false and misleading would be substantial and remedial.

October 28, 2016

Respectfully submitted.

/s/ Barbara J. Linert

/s/ Steven J. Timmer

## Certificate of Service

Steven J. Timmer certifies that he emailed the attached Memorandum in Support of a Probable Cause Finding, and a copy of each of the exhibits referred to in the Memorandum, all in portable document format, on Respondent Michelle A. MacDonald on Friday afternoon, October 28, 2016 to the address [michelle@macdonaldlawfirm.com](mailto:michelle@macdonaldlawfirm.com), with a copy to Debbie Sampson, an employee in Ms. MacDonald's firm, at [debbie@macdonaldlawfirm.com](mailto:debbie@macdonaldlawfirm.com).

October 28, 2016

/s/ Steven J. Timmer

**RECEIVED**

by OAH on 10/31/16 3:29 p.m.

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer

Docket No.: 71-0320-33929

Complainants

Vs.

Michelle MacDonald

Respondent

Supreme Court Candidate Michelle MacDonald's Preliminary Response to the Complaint by Steven Timmer and Barbara Linert

The undersigned, Michelle MacDonald, hereby submits to the Honorable Jessica A. Palmer-Denig, Administrative Law Judge, her preliminary response to the complaint of Steven J. Timmer and Barbara Linert, dated October 25, 2016 and filed October 25, 2016.

I further submit evidence that demonstrates that the complaint by Mr. Timmer was filed in bad faith. Mr. Timmer has made material misrepresentations by omitting that he is proprietor of a website LeftMN, and that in conjunction with blogger Michael Brodkorb, arranged to file his complaint after the two invited social media attention, and after the Star Tribune post was removed.

The index of Exhibits 1- 9 are attached and incorporated by reference below.

**I. MICHELLE MACDONALD DID NOT VIOLATE THE FAIR CAMPAIGN PRACTICES ACT MINN. STAT. §211B.02 (2016).**

More likely than not Michelle MacDonald did not violate the Fair Campaign Practices Act Minn. Stat. §211B.02 (2016)

The facts are as follows:

I am a candidate for the Minnesota Supreme Court. I was endorsed by the Republican Party of Minnesota in 2014.

I was recommended for endorsement by the GOP's Judicial [S]election Committee in 2016. As such, the post by the Star Tribune Voter Guide on October 20, 2016 indicating this endorsement did not constitute a *False Claim of Support* in contravention of Minn. Stat. 211B.02.

*A. Letter From Tim Kinley, Republican Party 2<sup>nd</sup> Judicial District Chair.*

Attached is a letter from Tim Kinley, a member of the Judicial Election Committee. In it, Mr. Kinley specifically states it is not a false claim that "the GOP's Judicial Election Committee endorsed Michelle MacDonald", nor is the Judicial Election Committee "fictitious". (EX. 1)

Mr. Kinley further states that "Many people call the judicial elections committee the judicial selection committee. It is a simple mistake that many people make."

As such, the claims by Ms. Linert and Mr. Timmer that I somehow violated the Fair Campaign Practices Act by the Star Tribune listing the "GOP's Judicial [S]election committee" and that this is a 'fictitious' entity is not the truth.

*B. Michelle MacDonald Arranged To Have The Star Tribune Post Removed.*

After learning of Mr. Brodkorb's tweet, described below, and in the exercise of an abundance of caution, I contacted the Star Tribune in person on October 21, 2016, and the post was taken down.

**II. COMPLAINT BY MR. TIMMER OF LEFTMN WAS FILED IN BAD FAITH.**

The complaint was filed in bad faith by Mr. Timmer and Ms. Linert as disseminated and posted on social media prior to my ever knowing there was an issue.

On October 25, 2016, the complaint was filed by Mr. Timmer according the OAH. Mr. Timmer knew that the post was not a false claim of support by the GOP's Judicial Election Committee, and he knew the committee was not fictitious. He also knew the post was removed.

Mr. Timmer has never spoken or contacted me, nor did he do so when he learned of the Star Tribune post.

Mr. Timmer has made material misrepresentations in the complaint, including omitting that he is the proprietor of a website: LeftMN.

Mr. Timmer, as proprietor of the social media site called LeftMN, has posted derogatory items about me. He has not proceeded with his complaint in good faith or for purposes of protecting the voters or other candidates from unfair campaign practices.

Mr. Timmer, along with Ms. Linert, instead chose to misrepresent and exaggerate a claim, when the simple facts are as stated above. This choice was to garner social and other media attention as stated below, and to facilitate Mr. Brodkorb's agenda.

In the past, Mr. Timmer's has posted items on LeftMN intended to injure my reputation and expose me to public contempt, ridicule and degradation. Mr. Timmer's complaint is an extension of that.

**III. BACKGROUND – POSTS BY MR. TIMMER ON LEFTMN.**

After I received notice of the complaint, I learned of Mr. Timmer's derogatory articles about me on his website LeftMN.

*A. Relevant Social Media Posts By Mr. Timmer, Ms. Linert And Mr. Brodkorb Demonstrating They were not Sincere in Their Complaint*

Before I was made aware of the issue, Mr. Timmer and Ms. Linert in conjunction with Mr. Brodkorb began a social media campaign. For example:

On October 19, 2016, Mr. Brodkorb's posted that "Michelle MacDonald candidate for the MN Supreme Court, claims she was endorsed by the MNGop "Judicial Selection Committee"- false." (EX. 2)

This was not false. I simply misspelled the committee's title in error.<sup>1</sup>

NOTE: After learning of posts by Mr. Brodkorb from other sources, with knowledge that he has an ax to grind, I contacted the Star Tribune, to take the post down, which they did on October 21, 2016.

On October 20, 2016, Mr. Brodkorb posted "A must-read post @stevetimmer on Michelle MacDonald's false claim of endorsement in the Star Tribune Voter Gide." (EX 3)

On October 20, 2016, Ms. Linert chimed in "not ready for prime time or the bench @blinert, by tweeting to me as a "must read" post by Mr. Timmer "false claim of endorsement in the star tribune voter guide,"<sup>2</sup> (EX. 4)

On October 20, 2016, Mr. Timmer had posted "Michelle MacDonald's loose grip on the law" which conveyed a misrepresentation about the post. (EX. 5)

On October 25, 2016, Mr. Brodkorb posted "New: A Campaign complaint was filed against Michelle MacDonald earlier today...more details soon." (Ex. 6)

On October 27, 2016, Mr. Brodkorb posted "Update: Judge schedules hearing on campaign complaint against Michelle MacDonald." (Ex. 7)

---

<sup>1</sup> Prior to these posts by Mr. Brodkorb, Mr. Brodkorb's attorneys were notified on August 15 and August 18, 2016, that he is publishing defamatory false statements. Since the notice, Mr. Brodkorb's has intentionally removed me from his twitter feed, in an effort to obstruct my ability to view and discern any continued false, exaggerated statements. Since the notices, Mr. Brodkorb has been stubborn and more vigilant in his false and misleading statements about me.

<sup>2</sup> In the past, Barbara Linert has also posted a tweet "MN isn't the only state with a screwball running for Supreme Court."(October 4, 2016)

These posts were all before I was even notified by the AOH of the issue. The intent of Mr. Brodkorb, Mr. Timmer and Ms. Linert in first publishing this on social media outlets to further an agenda to blemish me and my candidacy demonstrates malice, and reckless disregard for the truth, and misuse of the office of Administrative Hearings.

*B. Background – Previous Posts Regarding Michelle MacDonald by Mr. Timmer*

I have now learned that Mr. Timmer regularly publishes photos and social media articles about me on his LeftMN website, both during my 2014 campaign for Minnesota Supreme Court, and my 2016 campaign for Minnesota Supreme Court.

Examples of articles Mr. Timmer has written, based on misinformation from Michael Brodkorb, are below. Each article depicts derogatory and defamatory statements about me. I would be happy to discuss these matters with Mr. Timmer and Ms. Linert directly, rather than him getting his erroneous data from Mr. Brodkorb:

“Michelle MacDonald’s Loose grip on law” (October 20, 2016).

“Four persons of interest” (April 29, 2015)

“Michelle’s pitch for Martyrdom” (May 1, 2015)

“Do you know where the girls are Michelle?” (April 24, 2015)

“Get out from under the Spell Sandra” (August 21, 2015)

“Cough it up Dale” (August 24, 2015)

“Did you bring your toothbrush, Mr. Nathan?” (April 29, 2016)

“It’ll probably be moot anyway.” (9-25-16)

“The trouble with Family Courts.” (June 3, 2015).

“Michelle that’s another fine mess you’ve gotten us into.” (June 3, 2014)

“Every Word screams: CRACKPOT!” (July 17, 2014)

**IV. CORRESPONDENCE TO STAR TRIBUNE ABOUT THE JUDICIAL ELECTION COMMITTEE AND MY ENDORSEMENT.**

I have attached earlier correspondence to the Star Tribune, including my letter dated August 31, 2016, to clarify my endorsement. (Ex 8) The Star Tribune published an editorial on September 21, 2016 to include my letter. (EX 9) These letters further clarified the nature of the Judicial Election Committee and my endorsement to the general public.

## V. CONCLUSION

The Star Tribune post on October 19, 2016 in the Voter Guide was accurate. As far as the complaint, Mr. Timmer of LeftMN engineered, published and disseminated the complaint through Mr. Brodkorb, without addressing it with me or notifying me first. I believe Mr. Brodkorb solicited Mr. Timmer to file the action, or vice versa in bad faith.

Mr. Timmer and Ms. Linert have inappropriately embroiled me in this OAH case, disruptive to my campaign for Minnesota Supreme Court. They have entered inappropriate information into the dialogue on their respective social media sites beforehand.

Their act of filing this OAH complaint is malicious. Their false claim has undermined the administration of justice.

I did not violate Minn. Stat. 211B.02 False Claim of Support. The claim was the truth. To eliminate any appearance of impropriety, the post was removed permanently.

As such, there is no probable cause to proceed, and I further submit that the complaint was filed in bad faith and not for the purposes of the protection afforded by the statute.

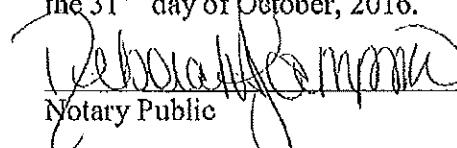
FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 10/31, 2016.



Michelle L. MacDonald

Subscribed and sworn to before me on  
the 31<sup>ST</sup> day of October, 2016.



Notary Public



INDEX OF EXHIBITS

Letter dated October 30, 2016 from Tim Kinley, Republican Party 2 <sup>nd</sup> Judicial District Chair.....	EX.1
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To whom it may concern,

I have read the complaint and am responding to the relevant allegations by stating that the GOP's Judicial Election committee endorsed Michelle MacDonald is not false nor is our committee fictitious.

My name is Tim Kinley. I am the chair of the Republican Party 2<sup>nd</sup> Judicial District.

One of my responsibilities as Chair of the 2<sup>nd</sup> Judicial District for the Republican Party of MN is to appoint people to the Republican Party Judicial Election committee. This is a committee that meets before the convention to seek and "vet" candidates for statewide judicial offices. This vetting is for the Minnesota Supreme Court and the Appellate Court.

The Judicial Election Committee has three main objectives.

1. To see if a judicial candidate meets the qualification for office.
2. To recommend or not recommend that the party endorse at the Republican Party state convention for a specific judicial seat.
3. To recommend or not recommend candidates for endorsement at the Republican Party state convention of specific judicial seats.
4. Ten days after the State Convention produce a judicial voters guide for the Republican Party.

The Judicial Election Committee is made up of:

1. 2 people from each of the 10 Minnesota Judicial Districts appointed by the Chair of each respected Republican Judicial District Committee.
2. 1 chair for the Judicial Election committee appointed by the State Party Chair.
3. 2 at large members appointed by the State Party Chair.

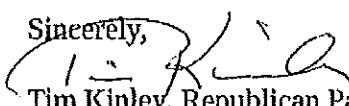
Total there were 23 members of the committee.

In regards to Michelle MacDonald, the judicial elections committee recommended that the Republican Party endorse her for the judicial seat that she was running for, the Minnesota Supreme Court. The judicial elections committee recommended that Michelle MacDonald was qualified for the seat and that the party endorse.

Many people call the judicial elections committee the judicial selection committee. It is a simple mistake that many people make.

The "minority report" required 1/3 vote and this rule was changed just before this convention to allow a minority report if there were two dissenters. In this case the two attorneys appointed by the Republican Party Chair, Keith Downey were the only dissenters. All of the non lawyers in the committee voted for Michelle MacDonald.

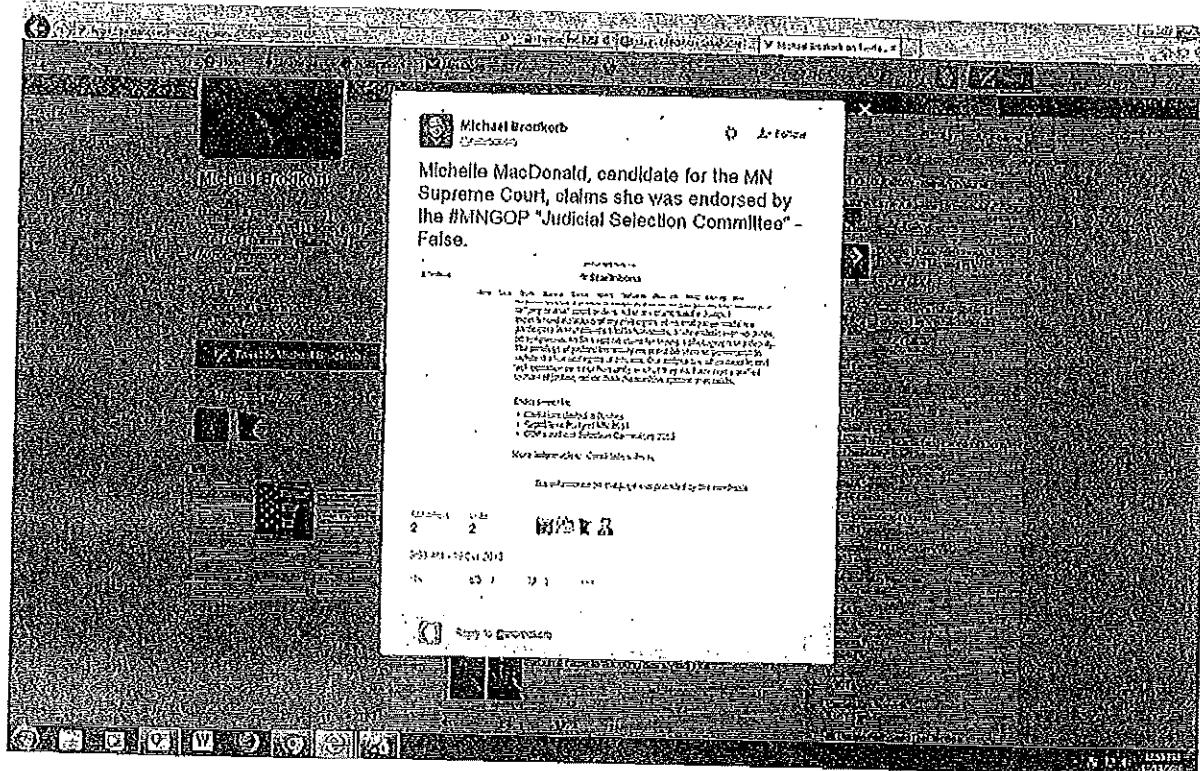
Sincerely,

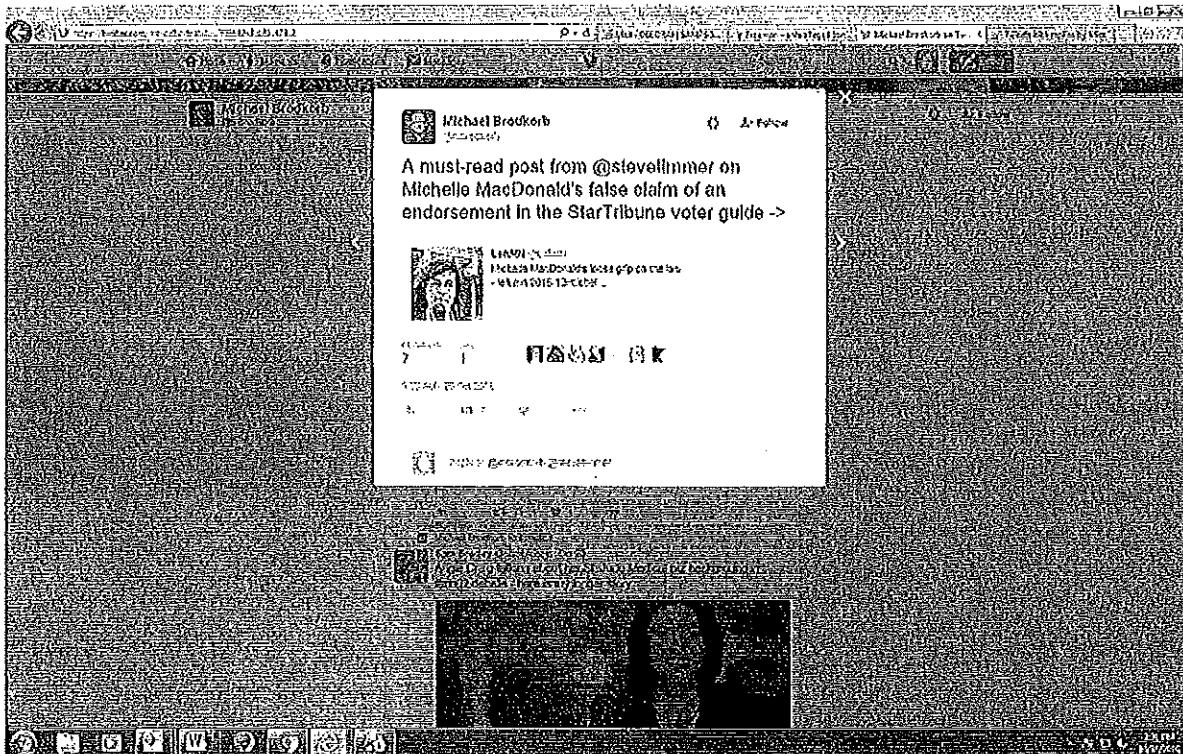


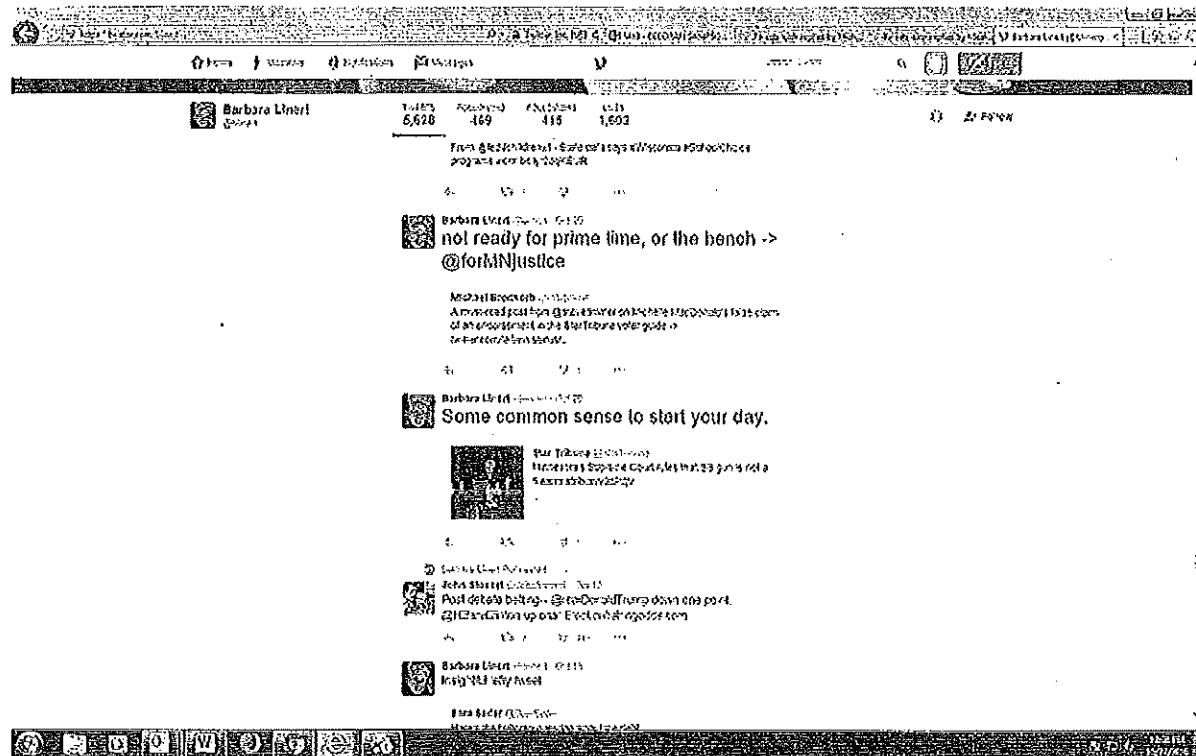
Tim Kinley, Republican Party 2<sup>nd</sup> Judicial District Chair.  
2231 Penn Place #104  
N. St. Paul, MN 55109  
651-492-8951 tckinley@yahoo.com

October 30, 2016









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ELECTIONS



Drinking LIBERALLY  
Thur 6-9  
89club



ABOUT LEFTMN ▾



Michelle MacDonald ([www.youtube.com](http://www.youtube.com)).

YOU MAY BE INTERESTED IN

Michelle, that's another fine mess you've gotten us into

The OAH: It isn't just for Inter-party disputes

Stamping out pockets of resistance

Do you know where the girls are, Michelle?

Every word screams: CRACKPOT!



## Michelle MacDonald's loose grip on the law

by Steve Timmer  
Oct 20, 2018, 11:00 AM

There is a section on the Star Tribune's website — a voter guide — where candidates for office can publish a brief statement about themselves. Candidate for the Minnesota Supreme Court, Michelle MacDonald, *um*, availed herself of the opportunity. Here's the profile she prepared.

myVote

CANDIDATE

Michelle L. McDonald

Candidate  
Supreme Court Justice  
Minnesota

Senate, No

City/State/Zip: Pleasant

Background:

For 29 years, I am an attorney in the "trenches" helping thousands of people with a variety legal challenges. Before hundreds of cases at every level including appeals to the Minnesota Supreme Court and the United States Supreme Court of America. For 22 of those years, I have been a small claims court judge and family court referee. I am founder and volunteer president of [www.FamilyInnocence.org](http://www.FamilyInnocence.org), a non-profit dedicated to keeping families out of court. I graduated from Boston College, Suffolk University Law School and the Harvard Program of Instruction for Lawyers. I am married with four grown children.

I draw your attention in particular to the endorsements section on page two. MacDonald writes that she had the endorsement of the Republican Party of MN 2014. That's true as far as it goes, but the endorsement has no currency, of course.

In fact, the Republican Party refused to endorse MacDonald at its 2016 convention, even though MacDonald sought one. It's a little misleading, don't you think?



EXHIBIT 10  
10/27/2016

But the real slinker comes a couple of lines down, where MacDonald claims this endorsement: "GOP's Judicial Selection Committee 2016."

MacDonald is dreaming here. There was no GOP Judicial Selection Committee. Under the RPM's constitution in effect at the time of 2016 state convention, there was a "judicial election committee" (referred to in lower case in the constitution); the word "selection" is nowhere mentioned. The purpose of the judicial election committee was simply to act as a screening committee, to make sure that candidates seeking endorsement met the requirements for the office. Its function was definitely not to endorse anybody; that was the convention's job, a job that the convention declined, as I stated earlier.

The judicial election committee *did* pass MacDonald on to the entire convention for consideration of an endorsement. But even that was not without controversy. There was a minority report issued by some members of the committee describing why MacDonald was unfit for endorsement.

There are two, well at least two, deceptive claims in MacDonald's reference to an endorsement from a judicial "selection" committee.

It wasn't an endorsement; it was just a candidate screen. If there had been ten candidates, and each one met the qualifications for endorsement, the committee presumably would have passed all the names along.

The committee wasn't selecting anyone for a ribbon, either. MacDonald's adding the word "selection" to the committee name is misleading, devious even.

As an aside, the Republican Party got so sick of this whole thing that it changed its constitution to require judicial candidates pass through the same nominating committee as candidates for other offices.

o O o

Minnesota law takes truth in endorsements seriously. Here's Minn. Stat. § 211B.02 (2016), titled False Claim of Support.

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

To repeat myself, the committee didn't endorse MacDonald; it didn't have the power of endorsement. It didn't even "select" her. The body with the power to endorse, the entire convention, pointedly declined to do so.

Sadly, this whole business is well-trod ground for the Republicans. It provides, though, one of my favorite stories of Republican internecine warfare involving, among others, two Republican activist lawyers, Harry Niska (one of the authors of the minority report linked above, by the way) and Bonn Clayton. The dust up went all the way to the U.S. Supreme Court (although the Supreme declined to hear the case last year).

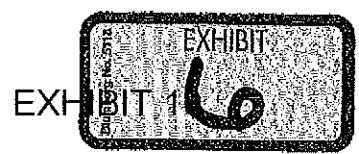
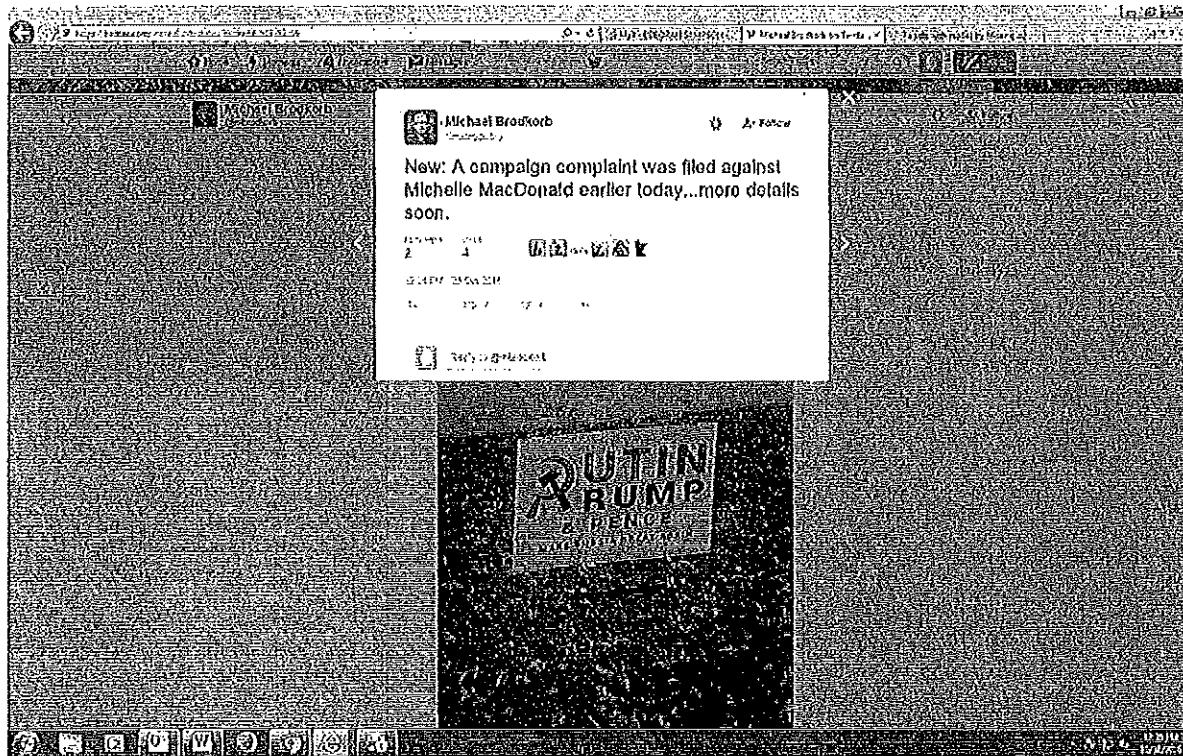
In the briefest outline, attorney Niska brought a complaint in the Office of Administrative Hearings against attorney Clayton for violating § 211B.02 during the 2012 election cycle by publishing misleading claims that three non-incumbent candidates for the Minnesota Supreme Court had received Republican Party endorsement, when instead they just had the imprimatur of a rump group of crackpots (well, Harry didn't say that; I just did) called the Judicial District Republican Chairs Committee, which didn't have the power of party endorsement.

The OAH agreed with Harry, and so did the Minnesota Court of Appeals which took up an appeal by Clayton. In its opinion, it said this:

Clayton's next argument is that the panel did not receive substantial evidence that he violated section 211B.02. He appears to assert that the ALJ panel erred by concluding that his actions constituted a false endorsement. A person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the

party. See *In re Ryan*, 303 N.W.2d 462, 485-86 (Minn. 1981) (holding that placing the terms "DFL" and "LABOR ENDORSED" on campaign materials violated the statute); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979) (finding the use of the initials "DFL" would falsely imply endorsement or support). Clayton used the term "Republican Party of Minnesota" on multiple documents and on his website while promoting candidates who lacked the party's endorsement. Clayton attended the state Republican convention and knew that the party had not endorsed his preferred candidates. The ALJ panel had ample evidentiary support for its finding that his actions knowingly and falsely implied that the RPM endorsed the candidates.

I probably don't even need to add that Bonn Clayton is a big fan of Michelle MacDonald. The reverse may also be true, since MacDonald seems to have followed Clayton's lead in violating the false endorsement statute.





MacDonaldforJustice



MICHELLE MACDONALD  
MacDonaldforJustice.com  
Michelle@MacDonaldforJustice.com  
Direct: 612-554-0932

August 31, 2016

Star Tribune Media Company LLC  
ATT: Jannette Gonzales  
650 3rd Ave. South, Suite 1300  
Minneapolis, MN 55488

Via Mail and Facsimile: 612-673-4359  
email:opinion@startribune.com

August 31, 2016

**Re: Supreme Court Candidate Michelle MacDonald  
False and Misleading Article by Editorial Board, August 1, 2016**

Dear Editorial Board and Jannette Gonzales:

On Monday, August 1, 2016, the Star Tribune ran an article by the "Editorial Board" entitled 'Natalie Hudson is 'clear choice' for Minnesota Supreme Court", with the subtitle "Her opponents lack her outstanding experience and temperament". I am writing to you as one of her "opponents." I have copied this article to Craig Foss. This article ran a week before the primary election, Tuesday, August 9, 2016.

The conclusion reached about me and Mr. Foss, that we were "not qualified for the office" represents a lie to Minnesota voters, and an inappropriate endorsement of a Candidate by your newspaper.

Pursuant to the Minnesota Constitution, and the laws of our state, all of the judicial candidates were qualified. Our Minnesota Constitution, Article VI, section 5, specifically addresses the qualifications that a "Judge of the Supreme Court" shall be "learned in the law".

Your article, and the conclusion you reached that we were "not qualified", represents a "clear" misrepresentation to your readers, as all three of us were qualified by the terms of the Minnesota Constitution, and the facts. The detailed Candidate Questionnaires you solicited represent that we were "learned in the law." Mine and Mr. Foss' Candidate questionnaires are attached.

I would ask that you immediately publish the Candidate questionnaires for myself and Mr. Foss (attached), and that of Natalie Hudson so that your readers can determine for



themselves our qualifications to make an informed decision as to Ms. Hudson and myself when they vote on Tuesday, November 8.

Your published statement about me was defamatory in nature and should promptly be retracted. You stated:

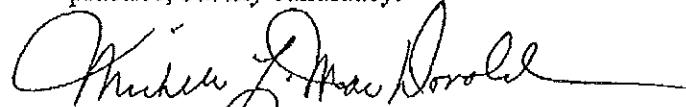
"The other candidates in this race are not qualified for the office they seek. Michelle MacDonald, 54, is a private attorney with an independent practice specializing in family law, founder of a nonprofit focused on keeping families out of court and resolving disputes."

You also falsely represented that "the State GOP declined to endorse MacDonald this year." The truth is that I was recommended for endorsement by the Judicial Selection Committee, and the state GOP changed their judicial endorsement process, declining to endorse any judicial candidate at the convention, not particular to me. You can watch the video on UPTAKE to determine for yourself the engineering and confusion that transpired with the voice vote "I" or "Nay".

You should also be aware that the Judicial Selection Committee was made up of 2 representatives from each of Minnesota's ten (10) Judicial Districts, and that all of those representatives (who were non-lawyers) *unanimously* recommended me for endorsement. However, Keith Downey, the chair of the Republican Party, appointed two young lawyers, Harry Niska and David Asp, to the Committee. Only the two *lawyers* appointed by Mr. Downey voted against recommending me for endorsement. As such, your statement that the Republican Party declined to endorse *me* in this 2016 election is misleading.

We would expect this particular article that conveys false and defamatory information be retracted no later than *Thursday, September 15, 2016*. Our suggestion would be to specifically address the qualifications required by the Minnesota Constitution, by publishing our respective Questionnaires, with a link to a recording of the interviews as available.

This action will serve to mitigate damages to me and my law firm. Material omissions are also a form of fraud and defamation, and implicate criminal statutes as well. I am running for Minnesota Supreme Court, and such false statements impact not only my law practice, but my candidacy.



Michelle L. MacDonald  
1069 South Robert Street, Suite U  
West St. Paul, Minnesota 55118

Cc. Craig Foss

## Editorials

Editorials represent the editorial voice of the Star Tribune. They are researched and written by the Editorial Department. This is independent of the newsroom.

### Star Tribune

MICHAEL J. KLINGENSCHIE, Publisher and CEO  
SCOTT GILLESPIE, Editor, Editorial Pages

WEDNESDAY, SEPTEMBER 21, 2016

## Readers Write

### PRESIDENTIAL POLITICS

How alarmed should we be, and is that really the right question?

Credit the Star Tribune Minnesota Poll with alarming statistics about how "alarmed" voters would be if their candidate does not prevail in November ("Most are 'alarmed' other side will win," Sept. 20). The question "How alarmed ...?" is a trap for poll respondents. It does not present a neutral starting point for their responses about the outcome of an election. Rather, the word "alarmed," like a firehouse bell call to action, creates a charged atmosphere, and forces participants to register alarm where none may exist.

There are plenty of alarming facts revolving around the contest between Donald Trump and Hillary Clinton. But this poll can only be considered an incendiary device. The emotional term "alarm" is the starting point for a poll that creates dramatic and polarizing quasi-news for readers, but it fails to objectify the questions posed and thus invalidates the results.

STEVE WATSON, Minneapolis

\*\*\*

I don't understand why anyone would be alarmed at the possibility of Hillary Clinton being elected president. Five minutes after the inauguration, Senate Majority Leader Mitch McConnell would call a news conference to state that the Republican Party's only priority is to ensure that Clinton is not re-elected. The House GOP would block any legislation that could possibly be seen as benefiting Clinton. The only bills that would pass are those that eliminate the Affordable Care Act, which would then be blocked in the Senate. Thus, there would be four more years of nothing accomplished.

BRUCE HOLCOMB, Stillwater

\*\*\*

Yesterday I read two items that did not mix well. One was an e-mail detailing how Trump and Clinton spew insults, call each other names, and act like whiny children. It also talked about how 62 percent of people polled want Gary Johnson included in the debates, and described the large amount of support he has among the military, young people, and certain areas of the country.

The other item was from the Star Tribune poll that focused only on Trump and Clinton. With questions like, "Which of the two leading candidates ..." the poll only served to sanction the flawed two-party system and reduce the public's faith in the claims of non-bias by mainstream media.

As the only other candidate with ballot access in all 50 states, Johnson should certainly be included in all of the polling (as well as the debates). So one outlet is pointing out the public's dissatisfaction with the current choices, and the other outlet perpetuates the current status.

BILL DODGE, Glencoe, Minn.

### MINNESOTA SUPREME COURT

Actually, Editorial Board, I am qualified to run for office

On Aug. 1, you ran a misleading article by the Editorial Board with the online headline "Natalie Hudson is clear choice for Minnesota Supreme Court," and a summary stating that "her opponents lack her outstanding experience and temperament." Minnesota voters should know that the conclusion that I was "not qualified for the office" is wrong.

Pursuant to the Minnesota Constitution, all of the judicial candidates were qualified. Our Minnesota Constitution, Article VI, section 5, specifically addresses the qualifications, stating that a "Judge of the Supreme Court" shall be "learned in the law."

Not only am I constitutionally qualified, but I have 29 years of experience as an attorney in the trenches serving thousands of people with legal challenges before hundreds of judges. I have experience in public service as a referee in family court and as a conciliation court judge.

As for the statement that "the State GOP declined to endorse MacDonald this year," the truth is that I was recommended for endorsement

by the Judicial Selection Committee, and the state GOP changed its judicial endorsement process, declining to endorse any judicial candidate at the convention. The Judicial Selection Committee was comprised of two representatives from each of Minnesota's 10 Judicial Districts. These 20 nonlawyer representatives unanimously recommended me for endorsement. However, GOP Chair Keith Downey appointed an additional two young lawyers to the committee, and only they voted against my endorsement.

Thank you for publishing a link to our website [www.MacDonaldforJustice.com](http://www.MacDonaldforJustice.com) so that readers can be better informed and draw their own conclusions about the judicial candidates.

MICHAEL L. MACDONALD, West St. Paul

### ST. CLOUD STABBINGS

It took a good guy with a gun to stop the mayhem at the mall

If it had been "Joe Citizen" with a weapon, instead of an off-duty police officer, who shot and killed the "slasher" in St. Cloud, would anti-gun Gov. Dayton, anti-gun President Obama, anti-gun liberals and the anti-gun news media have called him a "hero"?

I believe not. I think these very people would have found a reason to state that ordinary citizens should not be allowed to carry concealed weapons in malls and such areas.

Had this off-duty police officer not decided to shop that evening, would a citizen have been there with a weapon to stop the attacks? Probably not, and there might have been deaths.

Some businesses post signs that no weapons are allowed. When they do, most honest people obey, while the bad guy doesn't, leaving the honest folks open to what started to happen in St. Cloud.

Thank God the officer carried his weapon that day. More people with permits need to carry.

TRD STORCK, Morris, Minn.

\*\*\*

With all the talk about banning firearms and putting other restrictions on them, luckily there was a man with a firearm to stop a man with a knife at the mall in St. Cloud. Now I suppose there will be a big uproar to ban all knives.

JOE MAKERPEACE, Appleton, Minn.

### ELECTRIC-ASSIST BIKES

The necessary regulations are in place to keep trails safe

The regulations defining electric-assist bicycles (allowed on bike trails) and motorcycles (not allowed) are quite specific and rational. I suppose the reader who complained about e-bikes (Readers Write, Sept. 19) also thinks that Segways, electric mobility scooters and power wheelchairs should be banned from trails because they get in his way and slow him down.

Apparently his objection to them is that there will be more people outdoors having fun pedaling instead of staying in their cars or on the couch, and he is angered/afraid of being passed. I can assure him that the little old lady who passes him at 20 mph on her e-bike is doing it all on her own, since the electric-assist is nil at that point.

JOHN OTTO, Shakopee

### YOUR VIEWS?

We welcome your participation in these pages, whether in letters for the "Readers Write" section or commentaries for the "Opinion Exchange" page.

The best way to contribute is through the "Submit a letter or commentary" link on our website, at [www.startribune.com/opinion](http://www.startribune.com/opinion). You can also submit by e-mail to [opinion@startribune.com](mailto:opinion@startribune.com).

Submissions must be exclusive to us in Minnesota. All must include the writer's real, legal name, address, occupation and phone numbers. Letters and rebuttals become the property of the Star Tribune and may be republished in any format. Letters should be brief, up to 250 words. Articles should be fewer than 700 words. Because of the volume of submissions, we cannot respond to all writers.

EXHIBIT 10



STATE OF MINNESOTA      )  
                                    ) ss.  
COUNTY OF DAKOTA      )

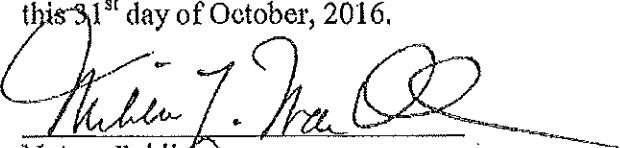
**AFFIDAVIT OF SERVICE**  
**BY E-MAIL AND US MAIL**

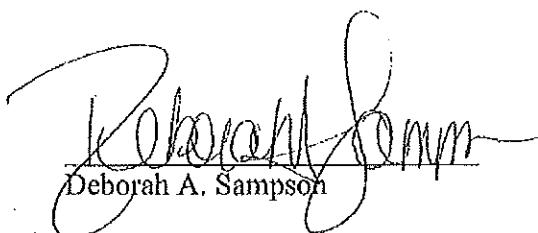
Deborah A. Sampson, being first duly sworn, deposes and says: That on October 31, 2016, she served the attached, *Preliminary Response to Complaint by Steve Timmer and Barbara Linert, with Exhibits*, upon the following named individuals by emailing a true and correct copy thereof to the following e-mail addresses; and depositing a true and correct copy thereof by U.S. Mail in the City of West St. Paul, County of Dakota, State of Minnesota, with postage prepaid, in an envelope directed and addressed to the above-named as follows:

Steven J. Timmer  
5348 Oaklawn Avenue  
Edina, Minnesota 55424  
[stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com)

Barbara J. Linert  
4282 Braddock Trail  
Eagan, Minnesota 55123  
[barbaralinert@gmail.com](mailto:barbaralinert@gmail.com)

Subscribed and sworn to before me  
this 31<sup>st</sup> day of October, 2016.

  
Notary Public

  
Deborah A. Sampson



**RECEIVED**

by OAH on 10/31/16 9:52 p.m.

State of Minnesota  
Office of Administrative Hearings  
PO Box 64620  
St. Paul, MN 55164-0620

Docket No. 71-0320-33929

Complaint for Violation of the Fair Campaign Practices Act  
Minn. Stat. § 211B.02 (2016)

Reply Memorandum of Complainants – October 31, 2106

This is a reply to Respondent Michelle L. MacDonald's response to the complaint filed by your Complainants, received this afternoon, October 31, 2016. The complaint asserts that it was a violation of Minn. Stat. § 211B.02 (2016) to supply information to the Star Tribune newspaper, published in a candidate profile, that claimed the endorsement of a fictitious committee of the Republican Party of Minnesota.

We note at the outset that in one of her exhibits in her response, Exhibit 8, that the candidate profile was not the first time that the Respondent claimed the endorsement of the "Judicial Selection Committee." Quoting from the exhibit, a letter dated August 31, 2016, to the Star Tribune complaining about the endorsement of incumbent Justice Natalie Hudson in the primary election, the Respondent states:

You also falsely represented that "the State GOP declined to endorse MacDonald this year." The truth is that I was recommended for endorsement by the Judicial Selection Committee, and the state GOP changed their judicial endorsement process, declining to endorse any judicial candidate at the convention, not particular to me. You can watch the video on UPTAKE to determine for yourself the engineering and confusion that transpired with the voice vote "Y" or "Nay".

You should also be aware that the Judicial Selection Committee was made up of 2 representatives from each of Minnesota's ten (10) Judicial Districts, and that all of those representatives (who were non-lawyers) *unanimously* recommended me for endorsement. However, Keith Downey, the chair of the Republican Party, appointed two young lawyers, Harry Niska and David Asp, to the Committee. Only the two *lawyers* appointed by Mr. Downey voted against recommending me for endorsement. As such, your statement that the Republican Party declined to endorse *me* in this 2016 election is misleading.

The Office of Administrative Hearings will undoubtedly be familiar with the names Harry Niska and David Asp, the complainant and the lawyer, respectively, in *Niska v. Clayton*, the authority on which your Complainants rest here.

As pointed out earlier, the actual committee, the judicial endorsement committee – known by its acronym “JEC” – did not have the power to endorse, and it most assuredly didn’t have the power to do that on behalf of the entire Republican Party of Minnesota, as Ms. MacDonald asserts.

Ms. MacDonald is the misleading party here.

And it bears repeating that the Respondent knew she wasn’t endorsed by the Party. From the Alpha News interview quoted earlier:

Michelle MacDonald: "I am not Republican endorsed this year"

- Time 7:13: "The Republican Party decided not to endorse judges, not specifically me, but that was the undertone...[cross-talk]...I am not Republican endorsed this year."

[Source: Fletcher Long interview with Michelle MacDonald, "The Long Version", October 5, 2016, accessed via podcast on October 23, 2016. Link: <http://longversionw4j.com/podcasts/>]

Michelle MacDonald acknowledged committee only "recommend[ed] her for endorsement":

- Time 3:35: "But ultimately, after my interview, and after I submitted all kinds of papers, this entire committee said 'we are going to recommend her for endorsement."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with MacDonald on May 21, 2016

Michelle MacDonald: "I still have the support of the true Republican Party":

- Time 7:52: "Well, I'm still running for Minnesota Supreme Court. I still have the support of the true Republican Party, which are not necessarily the delegates, which I would have gotten support of if I had been able to speak. But the people, the people of Minnesota who elect the delegates."

[Source: "Michelle MacDonald Confronted at State Convention – Party Chooses No Endorsement", Alpha News, May 23, 2016. Story included audio interview with

MacDonald on May 21, 2016. Link: <http://alphaneWSmn.com/delegates-mngop-convention-choose-no-endorsement-michelle-macdonald/>

Here, Ms. MacDonald says that she *wasn't* endorsed by the Party, that she *was* supported by the "true Republican Party," and that the "entire committee," was going to recommend her for endorsement. As also pointed out earlier, this last statement isn't true either; there were dissenters who prepared a minority report.

This is obfuscation upon obfuscation upon obfuscation. The Office of Administrative Hearings must call it what it is: a knowing and intentional violation of Minn. Stat. § 211B.02 (2016).

October 31, 2016

Respectfully submitted on behalf of the Complainants,

/s/ Steven J. Timmer

### Certificate of Service

Steven J. Timmer certifies that he emailed the attached Reply Memorandum to Respondent Michelle A. MacDonald on Monday evening, October 31, 2016, to the address [michelle@macdonaldlawfirm.com](mailto:michelle@macdonaldlawfirm.com), with a copy to Debbie Sampson, an employee in Ms. MacDonald's firm, at [debbie@macdonaldlawfirm.com](mailto:debbie@macdonaldlawfirm.com).

October 31, 2016

/s/ Steven J. Timmer

OAH 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

**ORDER ON  
PROBABLE CAUSE**

v.

Michelle MacDonald,

Respondent.

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a probable cause hearing, held by telephone on November 1, 2016, to consider a complaint filed under the Fair Campaign Practices Act on October 25, 2016.

Barbara Linert and Steven Timmer (Complainants) appeared on their own behalf and without legal counsel. Michelle MacDonald (Respondent) appeared on her own behalf without legal counsel.

Based upon the complaint and the hearing record and for the reasons set forth in the Memorandum below:

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. There is probable cause to believe Respondent violated Minn. Stat. § 211B.02 (2016), as alleged in the complaint. This matter will be assigned to a panel of three administrative law judges for further consideration.

2. Should the parties decide that an evidentiary hearing is not necessary and that this matter may be submitted to an assigned panel of judges for a decision based on the file, the record created at the probable cause hearing, and final written argument, they should file a statement to that effect by 4:30 p.m. on **Monday, November 7, 2016**.

3. If all parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing before an assigned panel of three administrative law judges in the near future.

Dated: November 3, 2016

---

JESSICA A. PALMER-DENIG  
Administrative Law Judge

## MEMORANDUM

### Factual and Procedural Background

Respondent is a candidate for the Minnesota Supreme Court in the November 8, 2016 election and is challenging incumbent Supreme Court Justice Natalie Hudson. The complaint alleges that Respondent violated Minn. Stat. § 211B.02 by falsely implying in campaign material that she has the endorsement of the Republican Party of Minnesota (RPM) in that judicial election race.

The complaint asserts that Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was posted in a "Voter Guide" section on the newspaper's website. In the "Endorsements" section of her candidate profile, Respondent claimed she was endorsed by:

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

Respondent's candidate profile with the listed endorsements was initially posted on the *Star Tribune* website on or about October 18, 2016. On October 21, 2016, Respondent requested that the *Star Tribune* remove the claim of endorsement by the "GOP's Judicial Selection Committee 2016." The endorsement was removed from Respondent's profile on or about October 21, 2016.<sup>1</sup>

Complainants maintain that Respondent's claim of an endorsement by the "GOP's Judicial Selection Committee 2016" was a false claim of support. Complainants contend the RPM does not have a "Judicial Selection Committee." It did have a "judicial election committee" under its then-operative constitution,<sup>2</sup> but this committee had no power to endorse candidates on its own.<sup>3</sup> It only had the authority to recommend candidates for

<sup>1</sup> Complaint, Attachment at 4; Testimony (Test.) of Michelle MacDonald.

<sup>2</sup> Complainants' Exhibit (Ex.) 2 at Article V, Section 3C.

<sup>3</sup> Test. of Barbara Linert.

party endorsement.<sup>4</sup> Complainants further contend that the word "endorsement" has a specific meaning and requires a vote in favor of endorsing a candidate by the delegates at the RPM convention.<sup>5</sup>

Complainants assert that Respondent was not endorsed by the RPM in 2016, and that Respondent was aware that she did not have the party's endorsement. Complainants argue that Respondent admitted in an August 31, 2016, letter to the *Star Tribune*'s editorial board that the state GOP "declin[ed] to endorse any judicial candidates at the convention."<sup>6</sup> Therefore, Complainants allege that Respondent knowingly created a false implication that the RPM endorsed her in this year's judicial election.

Respondent argues that the complaint in this case was not filed in good faith. She maintains that her reference to the "Judicial Selection Committee" was a typographical error and that this error is a common mistake.<sup>7</sup> Respondent denies that the reference was an attempt to imply that a fictitious party "selection" committee endorsed her. Respondent testified that a majority of the judicial election committee members recommended her for endorsement to the RPM, and Respondent contends that their support essentially constitutes an endorsement by that committee. Therefore, according to Respondent, her claim of endorsement by the "GOP Judicial Selection Committee 2016" is true and not a false implication of endorsement by the RPM.

During the probable cause hearing, the parties stipulated that the RPM constitution in effect at the time of the RPM's 2016 state convention provided that delegates would vote on whether to consider endorsing candidates for Minnesota Supreme Court and Minnesota Court of Appeals following "the report of the judicial election committee."<sup>8</sup> Ultimately, the delegates at the RPM state convention in 2016 voted not to consider endorsing any judicial candidates.<sup>9</sup>

### Legal Standard

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.<sup>10</sup> The administrative law judge must decide whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the complaint at a hearing on the merits.<sup>11</sup> If the administrative law judge is

<sup>4</sup> *Id.*; Complainants' Ex. 2.

<sup>5</sup> Test. of B. Linert; Complainants' Ex. 2 at Article V, Section 3C.

<sup>6</sup> Respondent's Ex. 8.

<sup>7</sup> Respondent's Ex. 1.

<sup>8</sup> Complainants' Ex. 2 at Article V, Section 3C.

<sup>9</sup> Test. of B. Linert and M. MacDonald; Respondent's Ex. 8.

<sup>10</sup> See *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 664 (Minn. 2003) ("[I]n civil cases probable cause constitutes a *bona fide* belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)) (internal punctuation omitted); see also *State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976) (explaining operation of probable cause standard in criminal context).

<sup>11</sup> See *In re Hortman v. Republican Party of Minn.*, No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Minn. Office Admin. Hearings, Oct. 2, 2006).

satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case, a campaign violation complaint should proceed.<sup>12</sup>

## Analysis

Minnesota Statutes, section 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party.

In *Niska v. Clayton*,<sup>13</sup> the Minnesota Court of Appeals upheld a decision by a panel of this tribunal finding that a person violated Minn. Stat. § 211B.02 by using the term “Republican Party of Minnesota” on multiple documents and on his website to promote candidates who lacked the party’s endorsement. The court stated that “[a] person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party.”<sup>14</sup>

Similarly, in *Schmitt v. McLaughlin*,<sup>15</sup> the Minnesota Supreme Court held that an unendorsed candidate’s use of the initials “DFL” violated the statute because it implied to the average voter that the candidate had the endorsement, or at the very least the support, of the Democratic-Farmer-Labor Party. The court explained that, while candidates have a right to inform voters of their party affiliation “by the use of such words as ‘member of’ or ‘affiliated with’ in conjunction with the initials ‘DFL’,” the use of the initials “DFL” without such modifiers creates a false implication of support.<sup>16</sup>

The Administrative Law Judge concludes that probable cause exists to believe Respondent violated Minn. Stat. § 211B.02 by claiming the endorsement of the “GOP’s Judicial Selection Committee 2016.” It is therefore reasonable to require Respondent to proceed to a hearing on the merits and to allow a panel of three administrative law judges to determine whether Respondent violated Minn. Stat. § 211B.02, and if so, to decide the appropriate penalty for such a violation.

The parties are directed to inform the undersigned Administrative Law Judge as to whether they wish to proceed to an evidentiary hearing or submit this matter to the assigned panel based on the complaint, filings, and record created at the probable cause hearing. Should the parties forgo the evidentiary hearing, they will be given the

<sup>12</sup> In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The court must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party’s favor. See, e.g., Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

<sup>13</sup> *Niska v. Clayton*, 2014 WL 902680 (Minn. Ct. App. 2014), *review denied* (Minn. June 25, 2014).

<sup>14</sup> *Id.* at \*6.

<sup>15</sup> 275 N.W.2d 587, 591 (Minn. 1979); see also *In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms “DFL” and “LABOR ENDORSED” on campaign materials violated the statute).

<sup>16</sup> 275 N.W.2d at 591.

opportunity to submit written argument as to what penalty, if any, is appropriate should the panel conclude Respondent violated Minn. Stat. § 211B.02.

**J. P. D.**

**RECEIVED**

by OAH on 11/7/16 12:33 p.m.

**Steven J. Timmer**  
5348 Oaklawn Avenue  
Edina, Minnesota 55424

November 7, 2016

E-filed

Hon. Jessica A. Palmer-Denig  
Administrative Law Judge  
Office of Administrative Hearings  
Post Office Box 64620  
Saint Paul, Minnesota 55164-0620

Re: Linert and Timmer v. MacDonald/OAH 71-0320-33929

Dear Judge Palmer-Denig:

Pursuant to the Probable Cause Order issued by Your Honor, the Complainants in this matter request an evidentiary hearing before a three-judge panel.

Thank you.

Very truly yours,



Steven J. Timmer

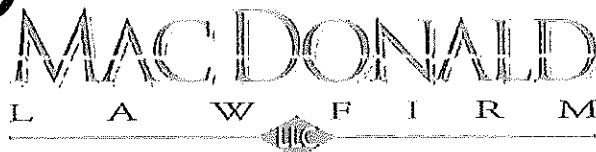
cc. Barbara J. Linert and Michelle L. MacDonald

/sjt

EXHIBIT 9

**RECEIVED**

by OAH on 11/7/16 11:53 a.m.



Michelle L. MacDonald  
Managing Attorney

November 7, 2016

Mailing & Delivery  
1069 So. Robert Street  
W. St. Paul, MN 55118  
Main: (651) 222-4400  
Fax: (651) 222-1122  
[www.MacDonaldLawFirm.com](http://www.MacDonaldLawFirm.com)

Honorable Jessica A. Palmer-Denig  
Minnesota Office of Administrative Hearings  
P.O. Box 64620  
St. Paul, Minnesota 55164

**Re: In The Matter of Barbara J. Liner & Steve J. Timmer (Michelle MacDonald)**  
**OAH 71-0320-33929**

Dear Jude Palmer-Denig:

We are in receipt of the Order On Probable Cause, dated November 3, 2016. We are requesting an evidentiary hearing be held on this matter.

Please advise when a date has been scheduled for the hearing. Please note I am unavailable on the following dates/times: all day on November 10, 11, 15, 16, the 17<sup>th</sup> until 12 pm, and after 4 p.m. and the morning of the 22<sup>nd</sup>.

Thank you for your consideration in this matter.

Very truly yours,

MACDONALD LAW FIRM, LLC

A handwritten signature in black ink that reads "Michelle L. MacDonald".

Michelle L. MacDonald  
Attorney at Law

MLM/das

cc: Steven J. Timmer (via email: [stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com))  
Barbara J. Linert (via email: [barbaralinert@gmail.com](mailto:barbaralinert@gmail.com))

OAH 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,  
vs.

**NOTICE OF ASSIGNMENT OF  
PANEL AND ORDER FOR  
EVIDENTIARY HEARING**

Michelle MacDonald,

Respondent.

On October 25, 2016, Barbara Linert and Steven Timmer (Complainants) filed an expedited Fair Campaign Practices Complaint with the Office of Administrative Hearings alleging that Michelle MacDonald (Respondent) violated Minn. Stat § 211B.02 (2016) by falsely implying in campaign material that she had the endorsement of the Republican Party of Minnesota.

On November 1, 2016, a probable cause hearing was conducted by telephone conference call. Complainants appeared on their own behalves without legal counsel. Respondent appeared on her own behalf without legal counsel.

By Order dated November 3, 2016, Administrative Law Judge Jessica A. Palmer-Denig found that Complainants had established that probable cause exists to believe that Respondent violated Minn. Stat. § 211B.02.

The scheduling for the hearing in this matter was extended based on the request of the parties to accommodate the scheduling conflicts.

**THEREFORE, NOTICE IS HEREBY GIVEN** that this matter has been assigned to a panel of three Administrative Law Judges for an evidentiary hearing to take place on **December 21, 2016**. The assigned Administrative Law Judges are: Jessica A. Palmer-Denig (Presiding Judge), Jeanne M. Cochran, and James E. LaFave.

**EVIDENTIARY HEARING PRACTICE**

1. By 4:30 p.m. on **Friday, December 16, 2016**, each party shall file three (3) copies with OAH, and serve upon the opposing party, a list of the witnesses that it intends to call at the evidentiary hearing.

2. By 4:30 p.m. on **Friday, December 16, 2016**, each party shall file three (3) copies with OAH, and serve upon the opposing party, copies of the pre-labeled exhibits that it proposes to offer into the hearing record. Complainants shall label their exhibits

sequentially using numbers. Respondent shall label her exhibits sequentially using letters.

3. An evidentiary hearing in this matter shall be held on **Wednesday, December 21, 2016**, at the Office of Administrative Hearings. The hearing shall begin at 9:30 a.m. The Office of Administrative Hearings is located at 600 North Robert Street in St. Paul, Minnesota.

## **HEARING PROCEDURES**

The evidentiary hearing has been ordered pursuant to the authority granted to the Chief Administrative Law Judge by Minn. Stat. § 211B.35, subd. 1 (2016). The hearing will be conducted pursuant to Minn. Stat. §§ 211B.35-.36 (2016). Information about the evidentiary hearing and copies of state statutes and rules may be obtained online at <http://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>. The Office of Administrative Hearings conducts proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota Supreme Court.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judges. The panel may consider any evidence and argument submitted until the hearing record is closed. The panel may continue a hearing to enable the parties to submit additional testimony. All hearings must be open to the public.

Any document filed with the Office of Administrative Hearings, or any documents that a party wishes to make part of the hearing record, may be filed in one of the following ways: (1) by **e-Filing** through the Office of Administrative Hearings' e-Filing system; (2) by **mail**; (3) by **facsimile** (if less than 50 pages total); or (4) by **personal delivery**. (See 2015 Minn. Laws. Ch. 63, § 7; Minn. R. 1400.5550, subp. 5 (2015)).

The e-Filing system is accessible at: <http://mn.gov/oah/forms-and-filing/efiling/>

The Office of Administrative Hearings' facsimile number is: (651) 539-0310.

## **WITHDRAWAL OF COMPLAINT**

At any time before an evidentiary hearing begins, a complainant may withdraw a complaint. After the evidentiary hearing begins, however, a complaint filed may only be withdrawn with the permission of the panel.

## **COSTS**

If the Panel determines the complaint is frivolous, it may order the complainant to pay the respondent's reasonable attorney fees and to pay the costs of the office in the proceeding in which the complaint was dismissed.

## **BURDEN OF PROOF**

The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.

## **DISPOSITION OF COMPLAINT**

At the conclusion of the evidentiary hearing, the panel must determine whether the violation alleged in the complaint occurred and must make at least one of the following dispositions:

- (1) The panel may dismiss the complaint.
- (2) The panel may issue a reprimand.
- (3) The panel may impose a civil penalty of up to \$5,000 for any violation of chapter 211A or 211B (2016).
- (4) The panel may refer the complaint to the appropriate county attorney.

The panel must dispose of the complaint within three days after the hearing record closes, if an expedited probable cause hearing was required by Minn. Stat. § 211B.33 (2016).

## **JUDICIAL REVIEW**

A party aggrieved by a final decision on a complaint filed under Minn. Stat. § 211B.32 is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63-.69 (2016).

Dated: December 12, 2016

---

TAMMY L. PUST  
Chief Judge

**Steven J. Timmer**

5348 Oaklawn Avenue  
Edina, Minnesota 55424  
952.607.7734

December 14, 2016

16 DEC 16 AM 7:34  
U.S. POSTAL SERVICE

Office of Administrative Hearings  
Post Office Box 64620  
Saint Paul, MN 55164-0620

Ms. Michelle MacDonald  
1069 South Robert Street, Suite U  
West St. Paul, MN 55118

Re: Linert & Timmer v. MacDonald – OAH 71-0320-33929

Everyone:

Pursuant to the Chief Judge's order, I enclose three (3) copies of the six (6) exhibits that the Complainants intend to offer at the hearing on this case on the 21<sup>st</sup>, along with three copies of this letter. (OAH package) I also enclose one copy of each of the exhibits in the MacDonald package.

Also pursuant to the same order, please note that the Complainants intend to call Harry Niska, themselves (Linert and Timmer), and the Respondent Michelle MacDonald as witnesses.

I certify that mailed these items postpaid to the addresses show on December 14, 2016.

Very truly yours,

  
Steven J. Timmer

Enclosures  
sjt



## Michelle L. MacDonald

**Candidate:**

Supreme Court Associate Justice,  
Minnesota

**Incumbent:** No

**City of residence:** Rosemount

### **Background:**

For 29 years, I am an attorney in the "trenches" helping thousands of people with a variety legal challenges before hundreds of judges at every level including appeals to the Minnesota Supreme Court and the United States Supreme Court of America. For 22 of those years, I have been a small claims court judge and family court referee. I am founder and volunteer president of [www.FamilyInnocence.org](http://www.FamilyInnocence.org), a nonprofit dedicated to keeping families out of court. I graduated from Boston College, Suffolk University Law School and the Harvard Program of Instruction for Lawyers. I am married with four grown children.

10/19/2016

politics

**Essay:**

We can no longer afford a government "of the lawyers, by the lawyers and for the lawyers." The Constitution exists to uphold fundamental rights we have by virtue of being born into this world ---rights like "the air you breath." Our laws, law enforcement, attorneys and courts regularly fail to recognize and uphold our liberty rights. Instead, to one degree or another, we are deprived of rights to live freely, to our property and resources, and to raise our children. Due process requires clear rules, government adherence to rules, a speedy trial, adequate legal representation and an appellate process. Law enforcement, attorneys and courts often fail to use their discretion wisely, and do not adhere to their own rules in attempts to "persecute" inherently good citizens, who have the right to be left alone if they are not harming anyone. Debtor's prison is supposed to be illegal, yet we can be subject to "pay or else" court orders. After my client sued a Judge, I experienced violations of my civil rights when that judge made me participate in that client's trial in handcuffs, a wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

**More information:** Candidate website*The information on this page was provided by the candidate.*

10/19/2016

politics

Timmer Exhibit 1000003

## Other candidates in this race

Natalie Hudson

# REPUBLICAN PARTY OF MINNESOTA CONSTITUTION

## Preamble

The Republican Party of Minnesota welcomes into its party all Minnesotans who are concerned with the implementation of honest, efficient, responsive government. The party believes in these principles as stated in the Declaration of Independence: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty, and the pursuit of happiness. Therefore, it is the party committed to equal representation and opportunity for all and preservation of the rights of each individual. It is the purpose of this constitution to ensure that the party provides equal opportunity for full participation in our civic life for all Minnesota residents who believe in these principles regardless of age, race, sex, religion, social or economic status.

## ARTICLE I Name and Object

**SECTION 1: Name.**

The name of this organization shall be Republican Party of Minnesota.

**SECTION 2: Object.**

The object of the party shall be the maintenance of government by and for the people according to the Constitution and the laws of the United States and the State of Minnesota, and the implementation of such principles as may from time to time be adopted by party conventions. To obtain this object it is essential the party shall organize at all levels to elect Republicans to public office.

## ARTICLE II Membership and Dues

**SECTION 1: Membership.**

The membership of the party shall be composed of all citizens of the State of Minnesota who desire to support the objectives of the party.

**SECTION 2: Dues.**

Payment of dues shall not be required as a condition of membership.

**SECTION 3: Rights.**

Nothing in this constitution shall be construed to deny or abridge the rights of any voter to participate in any party caucus, primary or convention, where he/she is entitled by law to participate.

## ARTICLE III Congressional and Legislative Reapportionment Committee

**SECTION 1:**

In the first odd numbered year following reapportion the State Executive Committee shall establish a standing committee to develop an operating policy and procedure manual for the next reapportionment period.

**SECTION 2:**

The reapportionment committee shall consist of a chair and one person from each Congressional

District. It is recommended that the appointee have actual Congressional District and/or Basic Political Organizational Unit (BPOU) leadership apportionment experience. The state party chair shall appoint the chair of the reapportionment committee. The Congressional District representative shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding appointment, by the Congressional District executive committee.

**SECTION 3:**

The reapportionment manual shall be prepared by the reapportionment committee and submitted to the Executive Committee for approval. The Executive Committee shall submit the reapportionment manual to the State Central Committee no later than January 1 of each census year.

**SECTION 4:**

Following the approval of the reapportionment manual by the Executive Committee and the State Central Committee, in all cases concerning reapportionment in which it is not in conflict with the constitution and bylaws of the Republican Party of Minnesota, the manual shall govern Congressional and Legislative reapportionment matters for the current reapportionment process.

**ARTICLE IV**  
**Delegation of Power**

**SECTION 1: Basic Unit.**

The party shall be organized into BPOUs, i.e., one of the following: County, House District, or Senate District except that in any county containing four or more entire House Districts the county must organize as House or Senate Districts.

**SECTION 2: Organization.**

It shall be the responsibility of the BPOU committees to assist all endorsed Republicans seeking public office at least partly within their respective units, to expand the membership of the party within their respective units, and to organize or cause to be organized each ward, precinct, or other voting district in their unit. The form of enrollment shall be prescribed by the State Executive Committee and shall be uniform throughout the state. No qualifications for membership shall be imposed except as provided by this constitution. Opportunity for enrollment shall be open at all times to all voters who are eligible for membership under Article II.

**SECTION 3: Management.**

The management of the affairs of the party within each basic political organizational unit shall be vested in the BPOU committee, subject to the direction of state and Congressional District authorities as to matters within the scope of their respective functions.

**SECTION 4: Territorial Realignment.**

A county committee of a county containing fewer than four entire House Districts may disband the county organization and reorganize itself along either Senate or House District lines, by adding a portion of an adjoining county or allocating part of the county's territory to another BPOU. A county committee may also realign its territory by adding a portion of an adjoining county and/or allocating part of its territory to another BPOU. The procedure shall be by approval of at least 60% of the county convention of each of the involved counties, provided that notice of such proposal for reorganization was issued in the call of the convention. The county convention shall submit its transitional plans including proposed distribution of funds to accomplish such reorganization to the Congressional District and State Executive Committees for their review. The new organization shall have all of the rights and responsibilities of a BPOU. Such reorganization shall continue until the next state-wide reapportionment or until the county form of organization is restored by a convention of the precinct Delegates within the original county lines called by authority of the Republican Party of Minnesota State Executive Committee or any Republican

Party of Minnesota state convention. No BPOU that is organized as a County BPOU can be forced to reorganize as a House District or Senate District.

**ARTICLE V**  
**Conventions and Endorsements - General Provisions**

**SECTION 1: Business and Call.**

**A.** Conventions shall transact such business as is specified in the call of the convention, and may transact such other business as a majority of the convention may determine, subject to the provisions of Article VIII, Section 2 of this constitution.

**B.** The call for a convention shall be issued at least ten (10) days prior to the convention, except that for an endorsing convention for a special election or for a post-primary endorsing convention, the call shall be issued at least five (5) days prior to the convention. Convention calls and reports required to be mailed prior to a convention may be issued electronically by email.

**SECTION 2: Registration.**

**A.** Notwithstanding Article II, Sections 2 and 3, registration fees may be assessed Delegates and Alternates attending a convention.

**B.** Once a Delegate or a seated Alternate has registered for the convention he/she remains part of the voting strength of the convention even if he/she leaves the convention prior to the convention's official adjournment.

**C.** A convention may close registration of Delegates and Alternates only if the convention call states the time at which registration will close. If the call states a registration closing time the convention may permit a later closing time for registration or may require the convention to remain open regardless of the language in the call.

**SECTION 3: Endorsements.**

**A. General Rules.**

**1.** It shall first be determined by a majority vote whether endorsement shall be considered for an office.

**2.** Voting on a candidate for endorsement for an office shall be by secret ballot. The convention or committee may decide by a two-thirds vote to endorse by a rising vote for any office for which there is only one candidate.

**3.** Votes may be cast for any person who by law is eligible for election to the office under consideration and who is eligible under this constitution to seek the endorsement, even though he/she has not been nominated or has withdrawn from nomination. Ballots may also be cast stating 'no preference' or 'undecided', or indicating no endorsement. Blank ballots or abstentions, unintelligible ballots, ballots marked only 'U' or 'X', or ballots cast for an ineligible person or a fictional character shall not be included in determining the 60% vote needed for endorsement. No preprinted ballot shall be allowed unless options for 'no preference', 'undecided' and 'no endorsement' are included.

**4.** A motion of no endorsement may be adopted by a majority vote. The rules of a convention may limit how often or when such a motion may be made. However on any round of voting for endorsement, a motion of no endorsement shall be considered adopted if a majority of the ballots (excluding blanks) or a majority of the votes on a voice vote (excluding abstentions) is for 'no', 'none' or 'no endorsement'.

5. Excepting the 60% requirement in this Article, BPOU constitutions may establish different rules of endorsement for conventions relating to legislative districts or other areas entirely within the BPOU.

6. An endorsement may carry with it the commitment of party resources, finances and volunteers only when made at a convention that is representative of the entire electorate for the office. In the case of a proposal for endorsement of a candidate whose constituency is not coterminous with the territory of the convention, only those Delegates residing within such constituency shall vote upon the proposal. An endorsement for public office at a convention below the level of the one that is representative of the entire electorate for the office shall be no more than an expression of the sentiment of the convention.

**B. Pre-Primary Endorsement.**

1. If the public office sought by the candidate is legally partisan, the candidate must agree prior to being considered for pre-primary endorsement to seek the office as a Republican if he/she receives the endorsement.

2. Any candidate for any elective public office may be granted pre-primary endorsement by any state, Congressional District, BPOU or other authorized convention if he/she receives a 60% vote of the convention and if the 60% is greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote.

3. Only one candidate may be endorsed per seat for a particular office.

4. When more than one candidate is nominated for endorsement for an office, none of the candidates for that office shall be voted upon separately.

**C. Rules for Minnesota Supreme Court and Minnesota Court of Appeals Endorsements.**

1. As to candidates for judicial office, the Republican Party of Minnesota shall at its state convention consider whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.

2. After the report of the judicial election committee, the state convention shall proceed to the vote on whether endorsement should be considered.

3. If the state convention votes affirmative on consideration of endorsement, the Delegates shall vote on endorsement of a person for that particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals. Endorsement may be conferred upon any person who by law is eligible for election to the office and who is eligible under this Constitution to seek endorsement, even if such candidate has not sought endorsement by the Republican Party of Minnesota or has communicated that such candidate does not desire and/or will not use Republican Party of Minnesota endorsement.

4. Except where they conflict with the special rules stated in this paragraph, the provisions of Article V, Section 3, A. and B. apply to endorsing candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.

**D. Endorsement By State Central Committee.**

If a primary election for any Minnesota statewide office or for United States Senator results in the selection of a nominee other than the Republican-endorsed candidate, a meeting of the State Central Committee shall be called by the State Party Chair or by the State Executive Committee

within five (5) days after the certification of the primary election results by the State Canvassing Board. The purpose of this meeting shall be to consider a post primary endorsement of the nominee(s) winning the primary election. Such a meeting may also consider post primary endorsement of a Republican nominee for any other statewide office or United States Senator for which no pre-primary endorsement was made. The State Party Chair or the State Executive Committee may call a meeting of the State Central Committee at any time after the State Convention to consider Republican endorsement by the State Central Committee of any candidate for statewide office or for United States Senator, if (1) the State Convention did not endorse any candidate for that office and such candidate's candidacy for that office had not been announced prior to the State Convention or (2) the endorsed candidate dies, withdraws, or is otherwise ineligible for election to the office sought. Any endorsement by the State Central Committee shall require a 60% vote of the registered Delegates (including seated Alternates) at such State Central Committee meeting and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates at such meeting as established by the last report of the credentials committee preceding such vote.

**E. Vacancies In Nominations.**

In the event of the death or withdrawal of an endorsed nominee for statewide office prior to the primary, or in the event of the death or withdrawal of a candidate after the primary, but 21 days prior to the general election, the State Central Committee shall consider the endorsement of a substitute nominee or candidate. The call for the meeting shall be issued at least five days prior to the scheduled meeting. In the event the candidate withdraws or dies less than 21 days prior to the general election, the State Executive Committee shall consider endorsement of a substitute candidate. Any endorsement by the State Central Committee shall require a 60% vote of the committee and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote. Any endorsement by the State Executive Committee shall require a 60% vote of the committee and such vote must be greater than or equal to at least a majority of the members of the committee.

**F. Legislative District Endorsing Conventions.**

1. A legislative district endorsing convention wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
2. Where a legislative district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
3. Where a legislative district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
4. In the event that a majority of the precinct chairs from a legislative district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. F. 2. or 3. F. 3. of this Article, shall issue the call for such convention.
5. In the event that all of the BPOU committees from a legislative district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

6. Eligible voters at legislative district endorsing conventions shall be the Delegates or their Alternates who reside within the legislative district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus.

7. Should the Delegates and Alternates qualified to vote at a legislative district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**G. County and County District Endorsing Conventions.**

1. For a county containing four or more entire House Districts a county convention may be held solely for the purpose of endorsement for county offices elected on a countywide basis. A county district convention may be held solely for the purpose of endorsements for county offices such as County Commissioner if elected by districts.

2. If a county or county district office lies wholly within a BPOU, a county convention shall be called by the BPOU committee.

3. If a county or county district office crosses BPOU lines, but lies wholly within a Congressional District the convention may be called by the Congressional District Executive Committee unless otherwise provided for in the Congressional District constitution.

4. If a county office crosses BPOU and Congressional District lines, the convention may be called by the State Executive Committee.

5. Should a county or county district consist of more than one (1) BPOU, a request for a county convention must be submitted by the committees of a majority of the BPOUs to:

a. Congressional District Executive Committee, unless otherwise provided for in the Congressional District constitution, if a county lies wholly within a Congressional District; or

b. State Executive Committee, if the county office crosses Congressional District lines.

6. In the event that all of the BPOU committees from a county or county district office that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

7. Eligible voters at a county or county district convention shall consist of those Delegates and Alternates who reside within a county or county district and who were duly elected at the most recent Republican Party precinct caucus held within the county or county district.

8. Should the Delegates and Alternates qualified to vote at the county or county district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

9. For Hennepin County the Hennepin County subcommittee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor. For Ramsey County the Congressional District committee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor.

**H. Judicial District Endorsing Conventions.**

1. A Judicial District endorsing convention may be held to consider endorsement of a candidate for Judge to a Judicial District Court in the district.
2. If a Judicial District lies entirely within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
3. If a Judicial District lies entirely within a County, the County Committee may issue the call for an endorsing convention and appoint the convener.
4. If a Judicial District crosses Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
5. If a Judicial District lies entirely within a Congressional District, and a majority of the BPOUs lying in whole or in part within the Judicial District petition in writing requesting an endorsing convention, the chair(s) of the Congressional District shall issue the call for the convention.
6. If a Judicial District crosses Congressional District lines and if a majority of the BPOUs that lie in whole or in part within the Judicial District petition the State Party Chair in writing requesting an endorsing convention, the State Party Chair shall issue the call for the convention.
7. In the event that all of the BPOUs lying in whole or in part within a Judicial District should request a Judicial Endorsing Convention, then the BPOUs may issue a joint call for such an endorsing convention and appoint the convener.
8. Eligible voters at Judicial District Endorsing Conventions shall be those who serve as Delegates or their Alternates to their Congressional District Convention who reside within the Judicial District.

**I. City, Ward, Township and School Board Endorsing Conventions.**

1. For cities and townships not included in Article X, Section 4, a city, ward, township or school board endorsing convention may be held for the purpose of endorsing candidates for city offices, township offices and school board, and the provisions in Article V, Section 3, I., 1-9 shall only apply to such cities, townships and school districts.
2. An endorsing convention for such a city, ward, township or school district wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
3. An endorsing convention for such a city, ward, township or school district wholly within a given Congressional District may be held subject to the provisions of said Congressional District constitution and/or bylaws, provided said provisions are not in

conflict with state statutes or the Republican Party of Minnesota State Constitution.

4. Where such a city, ward, township or school district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.

5. Where such a city, ward, township or school district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.

6. In the event that a majority of the precinct chairs from such a city, ward, township or school district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. I. 4. or 3. I. 5. of this Article, shall issue the call for such convention.

7. In the event that all of the BPOU committees from such a city, ward, township or school district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

8. Eligible voters at such city, ward, township or school district endorsing conventions shall be the Delegates or their Alternates who reside within the city, ward, township or school district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus held within the political boundaries of the legislative district.

9. Should the Delegates and Alternates qualified to vote at such a city, ward, township or school district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**SECTION 4: Seating of Alternates.**

Once the temporary organization has been established, the first order of business of a state or Congressional District convention shall be the seating of Alternates. The permanent voting roll of the convention shall be composed of the Delegates of each BPOU who actually are present, and in the absence of any Delegate to the convention, an Alternate shall be seated in his/her stead during his/her absence according to the procedure established by the constitution or bylaws of the BPOU. When a Delegate returns to the floor of the convention, he or she will be seated immediately.

**SECTION 5: Election and Terms of Delegates.**

A. All state, Congressional District, BPOU, and Delegates and Alternates shall be elected in general election years and shall hold office for a term of two years or until their successors are elected, or upon adoption in their respective BPOU constitution, they may elect Delegates and Alternates to the Congressional District and state conventions annually in the same manner as provided in the general election year, and these Delegates and Alternates elected under this option shall hold office for a term of one year, or until their successors are duly elected.

B. All affiliate Delegates and Alternates shall serve a two year term or until their successors are elected. Affiliate Delegates and Alternates shall not hold the same office for consecutive terms. An affiliate Delegate or Alternate may not be a regular party Delegate or Alternate to the same

convention. Affiliate Delegates and Alternates to Congressional District conventions must reside in the Congressional District and must be elected by the affiliate members who reside in the Congressional District and will be legally qualified voters in the next general election.

C. In compliance with the rules of the Republican National Convention, no Delegate or Alternate may be an automatic Delegate or Alternate. Each Delegate or Alternate must be elected by his/her respective convention. No Delegate to the Republican National Convention shall be bound by party rules or by state law to cast his/her vote for a particular candidate on any ballot at the convention except that the state convention may bind the Delegates whom it elects to the National Convention of the Republican Party on the first ballot to vote for a candidate for the office of President of the United States, unless they be released by said candidate.

**SECTION 6: Vacancies.**

At all levels within the party a vacancy shall occur in a Delegates position upon his/her death, resignation or removal from the geographical area from which he/she was elected, or upon the failure of the body having the power of election to fill such position, if no duly elected Alternate is available to fill the vacancy. Vacancies shall be filled in the same manner as the original Delegate or Alternate was elected.

**SECTION 7:**

Nothing in this Article is intended to affect the right of the convention to authorize, by rule, the Delegates present to vote the entire voting strength of the BPOU.

**ARTICLE VI**  
**State Convention**

**SECTION 1: Composition.**

State conventions shall be composed of the following:

A. Delegates from various BPOUs of the state who are elected at their conventions. The number of Delegates from the various BPOUs shall be apportioned among the BPOUs upon such basis as the State Executive Committee or the State Central Committee may determine, provided that the basis of apportionment shall be uniform throughout the state, and shall be based upon the vote for the Republican candidate for Governor in the last preceding statewide general election; or, if such election were a presidential election, the vote cast for the Republican candidate for President. If the number of Delegates apportioned to a BPOU is less than two, the total number of Delegates shall be increased to a minimum of two Delegates for each BPOU.

B. Subject to Article V, Section 5, B., two Delegates and two Alternates elected by each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.

**SECTION 2: Committees.**

State convention committees consisting of a platform committee, a rules committee, a credentials committee, a judicial election committee, a nominating committee and such other state convention committees as may be necessary or desirable shall be organized. Members in each committee shall be appointed as follows:

A. An equal number of members from each Congressional District to be appointed by the district chair(s) of the respective Congressional District, except as provided by Section 5A below with respect to the judicial elections committee.

B. Members at large to be appointed by the state party chair, the number of which is not to exceed 15% of the total membership of any committee.

C. A chair to be appointed by the state party chair.

**SECTION 3: Nominations Committee.**

A. To be eligible to be considered for endorsement or election, candidates for statewide nonjudicial endorsement and candidates for National Delegate or Alternate must meet all legal requirements and submit nominating petitions to the Nominating Committee containing the printed names and signatures of a minimum of 2% of the State Convention Delegates.

B. The Nominations Committee shall report to the convention those candidates who have met the petition and legal requirements at Section 3A and whether the Nominating Committee deems the candidates to be qualified or unqualified to receive endorsement or be elected.

**SECTION 4: Rules Committee.**

The Rules Committee report shall be mailed at least seven (7) days in advance of the convention.

**SECTION 5: Platform Committee.**

A. The function of the platform committee shall be to maintain a permanent platform for the Republican Party of Minnesota based upon the platform adopted at the previous regular Republican State Convention. The permanent platform may only be amended as provided in this constitution and the rules of the state convention. The committee will be responsible for performing the work described in subsection C. below.

B. The platform committee shall meet in even numbered years at the call of its chair or the state party chair. The final committee report shall be presented to the state party chair and be mailed to convention Delegates and Alternates at least seven (7) days prior to the state convention. The committee shall then present the final committee report to the state convention to be voted on in the manner prescribed by this constitution and the rules of the convention.

C. In even numbered years the platform committee shall review the permanent platform and all of the resolutions passed at Congressional District conventions for Congressional Districts that have a representative on the platform committee and any additional resolutions brought to the committee in the manner prescribed by the state convention rules. The committee shall determine which resolutions are new resolutions (i.e., address issues that are not addressed in the current permanent platform). The committee will recommend to the state convention the following changes:

1. Adoption of the new resolutions identified by the committee;
2. Renewed adoption of any resolution of the platform designated to sunset;
3. Elimination of those resolutions that are no longer germane;
4. Combining those resolutions that are similar;
5. Clarifying those resolutions that are confusing;
6. Reconsideration of those resolutions that are in conflict with other resolutions; and
7. Any resolution submitted by a majority of Congressional Districts shall be included in the platform committee final report.

The Committee has discretion to make recommendations to the state convention to limit the size of the platform including a recommendation to designate resolutions of the platform for

sunsetting.

**D.** All motions related to the platform committee report shall be voted upon at the state convention in the manner prescribed in the convention rules and need to be adopted by a minimum of sixty (60) percent of the last credentials report.

**E.** The creation of a permanent platform for the Republican Party of Minnesota will not limit the authority of any BPOU or Congressional District with respect to adopting their own platform.

**SECTION 6: Judicial Election Committee.**

**A.** The judicial election committee will consist of two (2) members from each Judicial District appointed by their respective Judicial District chair(s).

**B.** The judicial election committee will meet for the purpose of reviewing and encouraging possible candidates for endorsement as well as preparing a voters guide on all known judicial candidates and incumbent judges of the Minnesota Supreme Court and the Minnesota Court of Appeals.

**C.** At the state convention, the judicial election committee will offer its report before it is determined by majority vote whether endorsement shall be considered for each particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals which is subject to the upcoming election.

**D.** The chair of the judicial election committee (or in the chair's absence, a substitute elected by the members of the committee) shall give the report of the committee for each particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals, which is subject to the upcoming election.

**E.** Within fourteen (14) days after the close of filing for candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals, the chair of the judicial election committee will present the voters guide to the State Executive Committee for approval. Once approved, the voters guide may be distributed to the general public.

**SECTION 7: Time and Place of Convention.**

A state convention of the party shall be held in each general election year as required by Minnesota State Statutes, at such time and place as the State Central Committee may determine. Special state conventions may be called at such other times and places and for such purposes as the State Central Committee may determine.

**SECTION 8: Issues Conference.**

In odd-numbered years the State Central Committee may organize a conference of party activists for the purpose of studying issues of topical interest to the Party. The conference shall be open to all interested Republicans and shall not be limited to State Convention Delegates and Alternates.

**SECTION 9: Presidential Electors.**

**A.** Presidential Electors shall be nominated by the State Convention in the year of each Presidential election as follows: (i) two (2) Presidential Electors shall be nominated at-large by the State Convention Delegates in accordance with the rules of the State Convention; and (ii) each Congressional District shall place in nomination one (1) Presidential Elector (a Congressional District Elector-Nominee) as provided in Article VII, Section 3, who shall be nominated by the affirmative vote of the State Convention, in accordance with the Rules of the State Convention.

**B.** Each Congressional District shall report to the State Convention the name of that Congressional District's Congressional District Elector-Nominee in the manner provided in the Rules of the State Convention.

C. If a Congressional District fails to select a Congressional District Elector-Nominee or a Congressional District Elector-Nominee is unable or unwilling to serve as a Presidential Elector prior to being nominated by the State Convention, a substitute Congressional District Elector-Nominee shall be placed in nomination in accordance with the Constitution or Bylaws of the Congressional District. If no provision exists in the Congressional District's Constitution or Bylaws for a substitute Congressional District Elector-Nominee, the Presidential Elector to be placed in nomination by that Congressional District shall instead be nominated by the State Convention Delegates in the manner provided for an at-large Presidential Elector as set forth above.

D. No person shall be nominated a Presidential Elector unless that person has been selected as a Congressional District Elector-Nominee or nominated at-large as provided herein.

E. If any Presidential Elector that has been nominated by the State Convention is unable or unwilling to serve after the state convention, the state executive committee shall nominate a replacement from the geographic body that nominated the original Presidential Elector.

## ARTICLE VII

### Congressional District Conventions

**SECTION 1: Composition.**

Congressional District conventions shall be composed of the following residents of the district:

A. Delegates apportioned to and elected at the BPOU convention, in the same manner as Delegates to state conventions.

Any BPOU that crosses Congressional District lines shall allot its apportioned Delegates to the Congressional Districts using the Republican vote cast for either Governor or President in the most recent general election. The manner of election shall be determined by the BPOU constitution, bylaws or by a motion of its convention.

B. Subject to Article V, Section 5, B., one Delegate and one Alternate who are residents of the Congressional District elected at a Congressional District caucus held by any of the statewide affiliate organizations as listed in the party bylaws, provided that the affiliate has at least ten eligible members residing in the Congressional District.

**SECTION 2: Time and Place of Convention.**

Congressional District conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, or the committees of the respective Congressional District, and at such other times and for such other purposes as the committee calling the conventions may determine. The Congressional District committee shall determine the place of holding Congressional District conventions in each district.

**SECTION 3: Presidential Elector Nominees.**

A. In each Presidential election year, each Congressional District shall be entitled to place in nomination one (1) person to be that Congressional District's Congressional District Presidential Elector-Nominee. A Congressional District Presidential Elector-Nominee may be selected by: (a) the affirmative vote of the Congressional District's Delegates at the Congressional District Convention held in a Presidential election year in accordance with the rules of the District Convention; or (b) by that Congressional District's District Convention Delegates in the manner provided in the Congressional District's constitution.

B. Each Congressional District Elector-Nominee shall be reported to the State Convention and nominated by the State Convention as provided in Article VI, Section 6 of this Constitution.

**ARTICLE VIII**  
**Basic Political Organizational Unit Conventions**

**SECTION 1: Composition.**

BPOU conventions shall be composed of the following residents of the BPOU: Delegates elected at the precinct caucuses that are held in each precinct every general election year as required by Minnesota statutes. The number of Delegates and Alternates at each convention and the basis of their apportionment shall be determined by the BPOU committee, provided that such basis shall be uniform throughout the BPOU and shall be based on the vote cast for the Republican candidate for Governor in the past preceding statewide general election; or if such election were a presidential election, the vote cast for the Republican candidate for President. Special caucuses for one or more precincts may be called by the BPOU committee in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies in precincts where such exist at the time of notice.

**SECTION 2: Time and Place of Convention.**

BPOU conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, the State Central Committee, the Congressional District committee or the BPOU committee. The conventions shall precede Congressional District and state conventions. Special BPOU conventions may be held at the call of the State Executive Committee, the State Central Committee, the Congressional District committee, or the BPOU committee at such time and for such purpose as the committee calling the same may determine. BPOU conventions shall be held at a place determined by the respective committee issuing the call.

**SECTION 3: Delegates and Alternates to State, Congressional District and Judicial District Conventions.**

Delegates and Alternates to the Congressional and Judicial Districts and to state conventions shall be elected at the BPOU conventions in even numbered years; or if provided in the BPOU constitution may be elected annually. A BPOU may elect up to twice as many Alternates as the number of Delegates allotted, provided that the BPOU convention or constitution specifies a method for the orderly seating of said Alternates to fill vacancies in the delegation. The qualifications to be elected a Delegate or Alternate are residence in the electing unit and being a legal and qualified voter in the next general election. All disputes concerning the seating of Alternates shall be settled according to that BPOUs constitution or bylaws. If seating of Alternates is not addressed in the BPOUs constitution or bylaws, then a caucus of the Delegates from that BPOU will meet to settle the issue.

**ARTICLE IX**  
**State Party Administration**

**SECTION 1: State Central Committee.****A. General Management.**

The general management of the affairs of the party in the state shall be vested in the State Central Committee, subject to the control of the state convention and this constitution.

**B. Composition.**

The State Central Committee shall consist of the following:

**1. The Members of the State Executive Committee and the Congressional District Chairs.**

Where the Congressional District constitution provides for one chair and one deputy chair instead of two chairs, the chair and the deputy chair will be members of the State Central Committee. The Congressional District chairs and Congressional District representatives to the State Executive Committee may appoint a designee to serve in their absence

provided that the designee is either a State Central Committee Alternate or Congressional District officer from his/her Congressional District. The state party officers, the national committeeman and committeewoman, and the state finance chair may appoint a designee to serve in their absence provided that the designee is a State Central Committee Alternate or Congressional District officer.

**2. One Delegate-at-large from each Congressional District.**

If a Congressional District constitution provides for a Congressional District representative to the State Executive Committee other than a Congressional District chair, then this person will be the Congressional District Delegate-at-large. If a Congressional District constitution provides that a chair will represent the Congressional District on the State Executive Committee, then the Congressional District shall elect in accordance with its constitution a Delegate-at-large and an Alternate in odd numbered years from within the Congressional District.

**3. One Delegate and one Alternate, elected from each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.**

**4. 300 Delegates and up to three times as many Alternates apportioned among the Congressional Districts, determined by the ratio of each Congressional District's Republican vote in the last general election for President or Governor. Congressional Districts shall further apportion all of their Delegates to their BPOUs, and no BPOU or portion thereof may be disenfranchised. The Congressional District shall determine the method for ensuring enfranchisement. Nothing herein shall be construed to require that every BPOU fragment qualify for its own Delegate or Alternate.**

The Delegates and Alternates shall be elected in odd numbered years from within the Congressional District in accordance with the provisions of the Congressional District constitution. A Congressional District Delegate or Alternate elected pursuant to this section shall serve a two year term commencing on the date of his/her election and terminating on the date his/her successor is elected. Such Delegates and Alternates must reside in the Congressional District and be eligible to be a legally qualified voter in the next general election.

In the event that any Congressional District Delegate and one of his or her Alternates are unable to attend a meeting of the State Central Committee, the Congressional District constitution shall provide for a procedure for appointment of a replacement from among the other Alternates elected in that Congressional District.

A vacancy in a Congressional District Delegate position shall be filled for the unexpired term by one of his or her Alternates if any, otherwise a vacancy in a Delegate or Alternate position may be filled for the unexpired term by the respective body of officers having power of appointment or election.

**5. Each Republican state constitutional officer and each Republican member from Minnesota of the United States Senate or the House of Representatives, or his/her appointee, shall be a member of the State Central Committee for the duration of his/her term of office.**

**6. The Speaker of the Minnesota House of Representatives, if a member of the Republican Caucus or his/her appointee (otherwise the leader of the House Republican Caucus or his/her appointee) and the leader of the Republican Caucus in the Minnesota State Senate or his/her appointee.**

**SECTION 2: State Executive Committee.****A. Composition.**

The State Executive Committee shall consist of the following:

1. The state chair, deputy chair, secretary and treasurer;
2. The national committeeman and committeewoman;
3. One district chair from each Congressional District or a Congressional District representative as provided for in the Congressional District constitution or bylaws who shall serve until a successor is elected;
4. The state finance chair.

**SECTION 3: State Party Officers.**

*[Prior to the election of a Chair in 2013, the positions of Secretary and Treasurer shall remain as one position.]*

**A. Composition.**

The state party officers shall consist of the following:

1. Chair
2. Deputy chair
3. Secretary
4. Treasurer

**B. Elections, Terms and Removals**

1. The State Party Chair, Deputy Chair, and Secretary shall be elected at large by the State Central Committee in accordance with the bylaws or upon the occurrence of a vacancy, as provided in clause 4 below.
2. At the first Executive Committee meeting after the election of a Party Chair or in the event of a vacancy in the Treasurer position, the Executive Committee shall elect a Treasurer by a 2/3 majority vote of the full membership of the Executive Committee. The Treasurer cannot simultaneously hold any other state party officer position.
3. State party officers shall not serve more than four (4) consecutive full terms in the same office. Unless otherwise provided, each party officer shall serve a two year term in accordance with the procedures established in the bylaws.
4. (i) Any state party officer may be removed by a two-thirds vote of the full membership of the State Executive Committee and confirmation by a vote of a simple majority of those present at the next meeting of the State central Committee. This party officer's position shall be considered vacant until the next State Central Committee meeting (ii) Any state party officer may be removed by a two-thirds vote of those present at any meeting of the State Central Committee.
5. In the event of a vacancy in the office of state chair, the deputy chair shall carry out the duties of the chair until a new state chair is elected and the State Central Committee shall meet within forty-five (45) days thereafter to elect a new state chair. In the event of a vacancy in the office of deputy chair, secretary, or treasurer, the state chair may appoint

an acting deputy chair, secretary, or treasurer subject to ratification by the State Executive Committee within thirty days after the appointment, to carry out the duties of the vacant office until a new officer is elected. The State Central Committee shall elect a new deputy chair or secretary at its next regularly scheduled meeting or, if such meeting is scheduled within thirty days after the vacancy occurs, at the second regularly scheduled meeting after the vacancy occurs.

**SECTION 4: General Provisions Relating to State Party Administration.**

**A. Terms of Appointees.**

Unless otherwise provided, persons appointed by a state party officer under this constitution shall have terms of office expiring with the expiration of the term of the appointing officer. Each such person may be removed at the discretion of the appointing officer. In the case of the death, removal from office or geographical area, or resignation of the appointing officer the persons appointed by such state party officer shall have terms expiring with the election by the State Central Committee of the new state party officer.

**B. No state party officer shall hold his or her office and at the same time receive monetary or inkind payment from any candidate or its campaign.**

**C. The state chair and deputy chair shall meet with the Congressional District chairs as a group at least once every three months.**

**ARTICLE X**  
**Congressional District Party Administration**

**SECTION 1: Congressional District Committee.**

**A. Duties and Responsibilities.**

The management of the affairs of the party pertaining to each Congressional District shall be vested in the Congressional District committee of such Congressional Districts, subject to the direction of the State Central Committee, the State Executive Committee, and the Congressional District convention, provided that the Congressional District committee shall have no jurisdiction over local affairs within the respective BPOUs in the Congressional District.

**B. Composition.**

The composition of each Congressional District committee shall be provided in their respective Congressional District constitution and/or bylaws.

**C. Officers.**

The officers of each Congressional District committee shall be at least one chair, a treasurer and such additional officers as may be determined by each Congressional District constitution and/or bylaws.

**D. Election of Officers.**

The Delegates to each Congressional District convention held in odd numbered years shall elect the officers of the Congressional District committee from any members of the party residing within the district.

**SECTION 2: Congressional District Executive Committee.**

The Congressional District Executive Committee shall consist of the officers of the Congressional District committee and such additional members as provided by the respective Congressional District constitution and/or bylaws.

**SECTION 3: Removals.**

Unless a Congressional District constitution or bylaws provide otherwise, any officer of a Congressional District committee, or any member of the Congressional District Executive

Committee, may be removed by a two-thirds vote of those committee members present at the Congressional District or Congressional District Executive Committee meeting, as applicable.

**SECTION 4: City Committees.**

For cities of the first class (and for cities located wholly within Hennepin County having a population of 75,000 or more), it shall be responsibility of the respective Congressional District committee to organize or cause to be organized such cities and wards thereof, located within their Congressional District, for city elections. The Congressional District committee may determine the number of Delegates and Alternates for such a city or ward convention and the basis of their apportionment, provided that such basis shall be uniform throughout the city and the wards thereof, and if such Delegates and Alternates are elected at the precinct caucuses held in even numbered years the apportionment shall be based on the Republican Party vote in the last general election for President or Governor. The constitution and/or bylaws of the respective Congressional District shall provide for the establishment of a city committee for such a city. A Congressional District may also give power and responsibilities to such a city committee, including the authority to elect officers and to call endorsing conventions for city office, subject to the provisions of the Congressional District constitution and/or bylaws.

## **ARTICLE XI** **Basic Political Organizational Unit Administration**

**SECTION 1: BPOU Committee.****A. Composition.**

The BPOU committee shall consist of the BPOU party officers and such other members as the BPOU constitution, bylaws, or convention may prescribe.

**B. Officers.**

The officers of each BPOU shall be at least one chair and such additional officers as may be determined by each BPOU constitution and/or bylaws.

**C. Election of Officers.**

The officers and other members of the BPOU committee shall be elected at each BPOU convention held in odd numbered years.

**D. Management and Fundraising.**

The management of the affairs of the party within the BPOU shall be as set forth in Article IV. Organizers or other representatives of state or Congressional District authorities shall not solicit membership or funds at an event held within any BPOU without at least 14 days written prior notice to the BPOU chair(s). (See Article IV, Section 2.)

**SECTION 2: BPOU Executive Committee.**

The BPOU convention may provide for a BPOU executive committee of such size as it deems proper, which shall be members of the BPOU committee.

**SECTION 3: Removals.**

Unless a BPOU constitution or bylaws provide otherwise, any BPOU representative on a Congressional District committee, or officer of a BPOU executive committee may be removed by a two-thirds vote of those members present at a BPOU committee meeting.

**SECTION 4: Vacancies in Precinct Offices.**

The BPOU chairman or chair with the approval of the BPOU committee may call a special caucus, for one or more precincts, in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies where such exist at the time of notice, or may provide for the appointment of an acting officer until an officer is duly elected.

**ARTICLE XII**  
**Judicial District Organization and Administration**

**SECTION 1:**

A Judicial District convention may create and organize a Judicial District Committee. A notice of intent to consider forming a Judicial District Committee shall be included in the call of the convention along with the proposal to consider endorsement. If such committee is created and organized, it shall be strictly auxiliary to the Republican Party of Minnesota and shall have no other powers except as provided herein. If a Judicial District Committee is formed, it shall search for candidates for judicial office and it may call conventions of its Judicial District. If a convention endorses for a judicial office, the Committee shall be responsible to secure the election of the endorsed candidate.

**ARTICLE XIII**  
**National Committeeman and Committeewoman**

**SECTION 1: Selection of National Committeeman and National Committeewoman.**

In the year of each presidential election, immediately before or immediately after the state convention that precedes the Republican National Convention, the State Central Committee shall meet and select a national committeeman and a national committeewoman.

**ARTICLE XIV**  
**Affiliates**

**SECTION 1: Purpose and Organization.**

The right of special organizations having Republican affiliations to exist and carry on their activities as they see fit, consistent with the object, platforms, and principles of the party shall be recognized. The organization of permanent local clubs and organizations of party members for the purpose of holding meetings and carrying on other activities in furtherance of party and public welfare shall be permitted and encouraged. The activities of all such organizations during the election campaigns shall be coordinated with authorized party activities and subject to the direction of the regularly constituted party organizations.

**SECTION 2: Procedures for Determining Affiliate Status.**

**A. Organizational Requirements for Affiliate Status.**

Each Organization applying to be recognized as an Affiliate Organization of the Republican Party of Minnesota shall submit to the State Party Chair a copy of its constitution, bylaws, any other governing documents and an Executive Officer roster of the organization. The organization shall hold a convention at least bi-annually to elect officers and delegates/alternates as applicable. Unless otherwise provided in the organization's constitution and/or bylaws, such convention shall be subject to the requirements in Article V.

**B. Procedures for Determining Affiliate Standing.**

The State Executive Committee shall review all affiliates' standing on a yearly basis. Written notice must be sent to the presiding officer of the affiliate no later than twenty (20) days prior to a State Executive Committee meeting at which the affiliate's standing will be reviewed. The State Executive Committee shall annually forward its recommendation of affiliates in good standing to the State Central Committee to be certified by the State Central Committee.

**SECTION 3: Representation at State and Congressional District Conventions**

Authorized statewide Affiliates shall be entitled to voting representation at Republican State Conventions in accordance with Article VI, Section 1, B. Authorized statewide Affiliates may be entitled to voting representation at Congressional District Conventions, subject to qualification, in accordance with Article VII, Section 1, B.

**ARTICLE XV**  
**Constitution and Bylaws, Committee and Amendments**

**SECTION 1: Constitution and Bylaws Committee.**

The Constitution and Bylaws Committee shall consist of a chair, and two persons from each Congressional District. The state party chair shall appoint the chair of the Constitution and Bylaws Committee. The Congressional District representatives shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding the appointment, by the Congressional District Executive Committee.

The Constitution and Bylaws Committee shall give consideration to and may propose appropriate amendments and/or revisions of the Constitution to the state convention. The Constitution and Bylaws Committee shall also give consideration to and propose appropriate amendments of the bylaws to the State Central Committee. One third of the committee members shall constitute a quorum.

Any member of the Constitution and Bylaws Committee shall have the privilege of addressing the state convention or the State Central Committee when any report of the Constitution and Bylaws Committee is being considered.

**SECTION 2: Amendments to the Constitution.**

This constitution may be amended by a majority vote at any state convention, provided that any proposal for amendment shall be referred to the state Constitution and Bylaws Committee and reported out of said committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the convention.

**SECTION 3: Bylaws.**

The State Central Committee and State Executive Committee shall operate under such bylaws as are deemed necessary for the transaction of the business of the party. The bylaws shall contain the specific delegation and division of responsibilities and duties among the various departments of the state organization and may specify whatever rules and administrative procedures the State Central Committee deems necessary.

**SECTION 4: Amendments to the Bylaws.**

The bylaws may be amended by a two-thirds (2/3) vote at any State Central Committee meeting after written notice of any proposal for amendment has been submitted with the notice of the meeting. Any proposal for amendment shall be referred to the state Constitution and Bylaws Committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the State Central Committee Meeting.

**ARTICLE XVI**  
**General Provisions**

**SECTION 1: Other Constitutions and Bylaws.**

Any body within the party organization may adopt and amend a constitution and/or bylaws for its own government not inconsistent with this constitution.

**SECTION 2: Removals.**

Notice of every proposal for removal by any committee or other body of the party shall be included in the notice of the meeting, and the individual concerned shall be served with a detailed statement of the charges against him/her at least ten days prior to such meeting.

**SECTION 3: Vacancies.**

- A. All vacancies shall be filled for the unexpired term by the respective bodies or officers having power of election or appointment, except officers or members of the Congressional District or BPOU committees that shall be filled by such committees.
- B. A vacancy shall occur upon the death or resignation of an officer or committee member or upon his/her removal from the geographical area from which he/she was elected.

**SECTION 4: Financial Data/Congressional District/Basic Political Organizational Unit, and Legislative District Budgets.**

- A. Upon request by the state party treasurer, the financial officer of any organization recognized under this constitution including but not limited to each Congressional District, each BPOU/Legislative District organization and affiliate shall prepare biennial budgets or submit financial data pertaining to the organization for review and shall submit financial data to the state party treasurer.
- B. The party treasurer shall report at least semiannually on the financial status of the state party to members of the State Central Committee.
- C. All money received in the name of the Republican Party of Minnesota shall be deposited in its account. All money received shall be reported by the state party treasurer along with copies of any reports required by state or federal law.
- D. No contribution shall be accepted and a unit of the party shall make no expenditure at a time when the office of treasurer of the respective unit is vacant.

**SECTION 5: Improper Use of Party Funds.**

No loan, in any form, may be made to any individual or party officer. In the event that any party officer, at any level of the Republican Party of Minnesota, converts to his/her own use any Republican Party funds, other party officers shall report such occurrence to the Chair of the Republican Party of Minnesota, diligently encourage and assist all law enforcement personnel in prosecuting the violator to the full extent of the law and shall work diligently to recover the misappropriated party funds.

**ARTICLE XVII**  
**Parliamentary Authority**

The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the party in all cases to which they are applicable and in which they are not inconsistent with the constitution and bylaws of the Republican Party of Minnesota, the statutes of the State of Minnesota, or any special rules of order the party may adopt.

Amended May 2012

# REPUBLICAN PARTY OF MINNESOTA CONSTITUTION

## Preamble

The Republican Party of Minnesota welcomes into its party all Minnesotans who are concerned with the implementation of honest, efficient, responsive government. The party believes in these principles as stated in the Declaration of Independence: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty, and the pursuit of happiness. Therefore, it is the party committed to equal representation and opportunity for all and preservation of the rights of each individual. It is the purpose of this constitution to ensure that the party provides equal opportunity for full participation in our civic life for all Minnesota residents who believe in these principles regardless of age, race, sex, religion, social or economic status.

## ARTICLE I Name and Object

**SECTION 1: Name.**

The name of this organization shall be Republican Party of Minnesota.

**SECTION 2: Object.**

The object of the party shall be the maintenance of government by and for the people according to the Constitution and the laws of the United States and the State of Minnesota, and the implementation of such principles as may from time to time be adopted by party conventions. To obtain this object it is essential the party shall organize at all levels to elect Republicans to public office.

## ARTICLE II Membership and Dues

**SECTION 1: Membership.**

The membership of the party shall be composed of all citizens of the State of Minnesota who desire to support the objectives of the party.

**SECTION 2: Dues.**

Payment of dues shall not be required as a condition of membership.

**SECTION 3: Rights.**

Nothing in this constitution shall be construed to deny or abridge the rights of any voter to participate in any party caucus, primary or convention, where he/she is entitled by law to participate.

## ARTICLE III Congressional and Legislative Reapportionment Committee

**SECTION 1:**

In the first odd numbered year following reapportion the State Executive Committee shall establish a standing committee to develop an operating policy and procedure manual for the next reapportionment period.

**SECTION 2:**

The reapportionment committee shall consist of a chair and one person from each Congressional

District. It is recommended that the appointee have actual Congressional District and/or Basic Political Organizational Unit (BPOU) leadership apportionment experience. The state party chair shall appoint the chair of the reapportionment committee. The Congressional District representative shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding appointment, by the Congressional District executive committee.

**SECTION 3:**

The reapportionment manual shall be prepared by the reapportionment committee and submitted to the Executive Committee for approval. The Executive Committee shall submit the reapportionment manual to the State Central Committee no later than January 1 of each census year.

**SECTION 4:**

Following the approval of the reapportionment manual by the Executive Committee and the State Central Committee, in all cases concerning reapportionment in which it is not in conflict with the constitution and bylaws of the Republican Party of Minnesota, the manual shall govern Congressional and Legislative reapportionment matters for the current reapportionment process.

**ARTICLE IV**  
**Delegation of Power**

**SECTION 1: Basic Unit.**

The party shall be organized into BPOUs, i.e., one of the following:  
County, House District, or Senate District except that in any county containing four or more entire House Districts the county must organize as House or Senate Districts.

**SECTION 2: Organization.**

It shall be the responsibility of the BPOU committees to assist all endorsed Republicans seeking public office at least partly within their respective units, to expand the membership of the party within their respective units, and to organize or cause to be organized each ward, precinct, or other voting district in their unit. The form of enrollment shall be prescribed by the State Executive Committee and shall be uniform throughout the state. No qualifications for membership shall be imposed except as provided by this constitution. Opportunity for enrollment shall be open at all times to all voters who are eligible for membership under Article II.

**SECTION 3: Management.**

The management of the affairs of the party within each basic political organizational unit shall be vested in the BPOU committee, subject to the direction of state and Congressional District authorities as to matters within the scope of their respective functions.

**SECTION 4: Territorial Realignment.**

A county committee of a county containing fewer than four entire House Districts may disband the county organization and reorganize itself along either Senate or House District lines, by adding a portion of an adjoining county or allocating part of the county's territory to another BPOU. A county committee may also realign its territory by adding a portion of an adjoining county and/or allocating part of its territory to another BPOU. The procedure shall be by approval of at least 60% of the county convention of each of the involved counties, provided that notice of such proposal for reorganization was issued in the call of the convention. The county convention shall submit its transitional plans including proposed distribution of funds to accomplish such reorganization to the Congressional District and State Executive Committees for their review. The new organization shall have all of the rights and responsibilities of a BPOU. Such reorganization shall continue until the next state-wide reapportionment or until the county form of organization is restored by a convention of the precinct Delegates within the original county lines called by authority of the Republican Party of Minnesota State Executive Committee or any Republican

Party of Minnesota state convention. No BPOU that is organized as a County BPOU can be forced to reorganize as a House District or Senate District.

## ARTICLE V

### Conventions and Endorsements - General Provisions

**SECTION 1: Business and Call.**

- A. Conventions shall transact such business as is specified in the call of the convention, and may transact such other business as a majority of the convention may determine, subject to the provisions of Article VIII, Section 2 of this constitution.
- B. The call for a convention shall be issued at least ten (10) days prior to the convention, except that for an endorsing convention for a special election or for a post-primary endorsing convention, the call shall be issued at least five (5) days prior to the convention. Convention calls and reports required to be mailed prior to a convention may be issued electronically by email.

**SECTION 2: Registration.**

- A. Notwithstanding Article II, Sections 2 and 3, registration fees may be assessed Delegates and Alternates attending a convention.
- B. Once a Delegate or a seated Alternate has registered for the convention he/she remains part of the voting strength of the convention even if he/she leaves the convention prior to the convention's official adjournment.
- C. A convention may close registration of Delegates and Alternates only if the convention call states the time at which registration will close. If the call states a registration closing time the convention may permit a later closing time for registration or may require the convention to remain open regardless of the language in the call.

**SECTION 3: Endorsements.****A. General Rules.**

- 1. It shall first be determined by a majority vote whether endorsement shall be considered for an office.
- 2. Voting on a candidate for endorsement for an office shall be by secret ballot. The convention or committee may decide by a two-thirds vote to endorse by a rising vote for any office for which there is only one candidate.
- 3. Votes may be cast for any person who by law is eligible for election to the office under consideration and who is eligible under this constitution to seek the endorsement, even though he/she has not been nominated or has withdrawn from nomination. Ballots may also be cast stating 'no preference' or 'undecided', or indicating no endorsement. Blank ballots or abstentions, unintelligible ballots, ballots marked only 'U' or 'X', or ballots cast for an ineligible person or a fictional character shall not be included in determining the 60% vote needed for endorsement. No preprinted ballot shall be allowed unless options for 'no preference', 'undecided' and 'no endorsement' are included.
- 4. A motion of no endorsement may be adopted by a majority vote. The rules of a convention may limit how often or when such a motion may be made. However on any round of voting for endorsement, a motion of no endorsement shall be considered adopted if a majority of the ballots (excluding blanks) or a majority of the votes on a voice vote (excluding abstentions) is for 'no', 'none' or 'no endorsement'.

5. Excepting the 60% requirement in this Article, BPOU constitutions may establish different rules of endorsement for conventions relating to legislative districts or other areas entirely within the BPOU.

6. An endorsement may carry with it the commitment of party resources, finances and volunteers only when made at a convention that is representative of the entire electorate for the office. In the case of a proposal for endorsement of a candidate whose constituency is not coterminous with the territory of the convention, only those Delegates residing within such constituency shall vote upon the proposal. An endorsement for public office at a convention below the level of the one that is representative of the entire electorate for the office shall be no more than an expression of the sentiment of the convention.

**B. Pre-Primary Endorsement.**

1. If the public office sought by the candidate is legally partisan, the candidate must agree prior to being considered for pre-primary endorsement to seek the office as a Republican if he/she receives the endorsement.

2. Any candidate for any elective public office may be granted pre-primary endorsement by any state, Congressional District, BPOU or other authorized convention if he/she receives a 60% vote of the convention and if the 60% is greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote.

3. Only one candidate may be endorsed per seat for a particular office.

4. When more than one candidate is nominated for endorsement for an office, none of the candidates for that office shall be voted upon separately.

**C. Rules for Minnesota Supreme Court and Minnesota Court of Appeals Endorsements.**

1. As to candidates for judicial office, the Republican Party of Minnesota shall at its state convention consider whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals. The nominations committee shall report, whether any candidate for endorsement has met the requirements of Article VI, Sec. 3.

2. After the report of the nominations committee, the state convention shall proceed to the vote on whether endorsement should be considered. The convention may only vote to endorse a candidate who has first satisfied the requirements of Article VI, Sec. 3.

3. If the state convention votes affirmative on consideration of endorsement, the Delegates shall vote on endorsement of a person for that particular office of the Minnesota Supreme Court and the Minnesota Court of Appeals. Endorsement may be conferred upon any person who by law is eligible for election to the office and who is eligible under this Constitution to seek endorsement, even if such candidate has not sought endorsement by the Republican Party of Minnesota or has communicated that such candidate does not desire and/or will not use Republican Party of Minnesota endorsement.

4. Except where they conflict with the special rules stated in this paragraph, the provisions of Article V, Section 3, A. and B. apply to endorsing candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.

**D. Endorsement By State Central Committee.**

If a primary election for any Minnesota statewide office or for United States Senator results in the selection of a nominee other than the Republican-endorsed candidate, a meeting of the State Central Committee shall be called by the State Party Chair or by the State Executive Committee within five (5) days after the certification of the primary election results by the State Canvassing Board. The purpose of this meeting shall be to consider a post primary endorsement of the nominee(s) winning the primary election. Such a meeting may also consider post primary endorsement of a Republican nominee for any other statewide office or United States Senator for which no pre-primary endorsement was made. The State Party Chair

or the State Executive Committee may call a meeting of the State Central Committee at any time after the State Convention to consider Republican endorsement by the State Central Committee of any candidate for statewide office or for United States Senator, if (1) the State Convention did not endorse any candidate for that office and such candidate's candidacy for that office had not been announced prior to the State Convention or (2) the endorsed candidate dies, withdraws, or is otherwise ineligible for election to the office sought. Any endorsement by the State Central Committee shall require a 60% vote of the registered Delegates (including seated Alternates) at such State Central Committee meeting and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates at such meeting as established by the last report of the credentials committee preceding such vote.

**E. Vacancies In Nominations.**

In the event of the death or withdrawal of an endorsed nominee for statewide office prior to the primary, or in the event of the death or withdrawal of a candidate after the primary, but 21 days prior to the general election, the State Central Committee shall consider the endorsement of a substitute nominee or candidate. The call for the meeting shall be issued at least five days prior to the scheduled meeting. In the event the candidate withdraws or dies less than 21 days prior to the general election, the State Executive Committee shall consider endorsement of a substitute candidate. Any endorsement by the State Central Committee shall require a 60% vote of the committee and such vote shall be greater than or equal to at least a majority of the registered Delegates and seated Alternates as established by the last report of the credentials committee preceding such vote. Any endorsement by the State Executive Committee shall require a 60% vote of the committee and such vote must be greater than or equal to at least a majority of the members of the committee.

**F. Legislative District Endorsing Conventions.**

1. A legislative district endorsing convention wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.
2. Where a legislative district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.
3. Where a legislative district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.
4. In the event that a majority of the precinct chairs from a legislative district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. F. 2. or 3. F. 3. of this Article, shall issue the call for such convention.
5. In the event that all of the BPOU committees from a legislative district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.
6. Eligible voters at legislative district endorsing conventions shall be the Delegates or their Alternates who reside within the legislative district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus.
7. Should the Delegates and Alternates qualified to vote at a legislative district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

**G. County and County District Endorsing Conventions.**

1. For a county containing four or more entire House Districts a county convention may be held solely for the purpose of endorsement for county offices elected on a countywide basis. A county district convention may be held solely for the purpose of endorsements for county offices such as County Commissioner if elected by districts.
2. If a county or county district office lies wholly within a BPOU, a county convention shall be called by the BPOU committee.
3. If a county or county district office crosses BPOU lines, but lies wholly within a Congressional District the convention may be called by the Congressional District Executive Committee unless otherwise provided for in the Congressional District constitution.
4. If a county office crosses BPOU and Congressional District lines, the convention may be called by the State Executive Committee.
5. Should a county or county district consist of more than one (1) BPOU, a request for a county convention must be submitted by the committees of a majority of the BPOUs to:
  - a. Congressional District Executive Committee, unless otherwise provided for in the Congressional District constitution, if a county lies wholly within a Congressional District; or
  - b. State Executive Committee, if the county office crosses Congressional District lines.
6. In the event that all of the BPOU committees from a county or county district office that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.
7. Eligible voters at a county or county district convention shall consist of those Delegates and Alternates who reside within a county or county district and who were duly elected at the most recent Republican Party precinct caucus held within the county or county district.
8. Should the Delegates and Alternates qualified to vote at the county or county district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.
9. For Hennepin County the Hennepin County subcommittee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor. For Ramsey County the Congressional District committee shall allocate the number of Delegates and Alternates for a county or county district convention based on the Republican Party vote in the last general election for President or Governor.

**H. City, Ward, Township, School Board, and Judicial District Endorsing Conventions.**

1. For cities, townships, and judicial districts not included in Article X, Section 4, a city, ward, township, school board, or judicial endorsing convention may be held for the purpose of endorsing candidates for city offices, township offices, school board, and judicial office and the provisions in Article V, Section 3, I., 1-9 shall only apply to such cities, townships and school districts.
2. An endorsing convention for such a city, ward, township or school district wholly within a given BPOU may be held subject to the provisions of said BPOU constitution and/or bylaws, provided said provisions are not in conflict with state statutes or the Republican Party of Minnesota State Constitution.

3. An endorsing convention for such a city, ward, township, school district, or judicial district wholly within a given Congressional District may be held subject to the provisions of said Congressional District constitution and/or bylaws, provided said provisions are not in

conflict with state statutes or the Republican Party of Minnesota State Constitution.

4. Where such a city, ward, township, school district, or judicial district crosses BPOU lines, but lies wholly within a Congressional District, the Congressional District Executive Committee may issue the call for an endorsing convention and appoint the convener.

5. Where such a city, ward, township, school district, or judicial district crosses BPOU and Congressional District lines, the State Executive Committee may issue the call for an endorsing convention and appoint the convener.

6. In the event that a majority of the precinct chairs from such a city, ward, township, school district, or judicial district which crosses BPOU or Congressional District lines should sign a petition requesting an endorsing convention and specifying the convener, the chair(s) of the Congressional District or state chair, on behalf of the respective executive committee which has jurisdiction as specified in Section 3. I. 4. or 3. I. 5. of this Article, shall issue the call for such convention.

7. In the event that all of the BPOU committees from such a city, ward, township, school district, or judicial district that crosses BPOU or Congressional District lines should request an endorsing convention, then the chairs of the respective BPOUs on behalf of their committees may issue a joint call for such an endorsing convention and appoint the convener.

8. Eligible voters at such city, ward, township, school district, or judicial district endorsing conventions shall be the Delegates or their Alternates who reside within the city, ward, township or school district and who were duly elected at the most recent Republican Party of Minnesota precinct caucus held within the political boundaries of the legislative district.

9. Should the Delegates and Alternates qualified to vote at such a city, ward, township, school, or judicial district convention not all be elected based on the same ratio of the Republican vote count, then those Delegates and Alternates elected based on the highest ratio of the vote count shall be counted as one (1) vote and those Delegates and Alternates elected on a lesser ratio of the vote count shall have the percentage of one (1) vote based on their percentage of the highest elected ratio of the vote count.

#### **SECTION 4: Seating of Alternates.**

Once the temporary organization has been established, the first order of business of a state or Congressional District convention shall be the seating of Alternates. The permanent voting roll of the convention shall be composed of the Delegates of each BPOU who actually are present, and in the absence of any Delegate to the convention, an Alternate shall be seated in his/her stead during his/her absence according to the procedure established by the constitution or bylaws of the BPOU. When a Delegate returns to the floor of the convention, he or she will be seated immediately.

#### **SECTION 5: Election and Terms of Delegates.**

A. All state, Congressional District, BPOU, and Delegates and Alternates shall be elected in general election years and shall hold office for a term of two years or until their successors are elected, or upon adoption in their respective BPOU constitution, they may elect Delegates and Alternates to the Congressional District and state conventions annually in the same manner as provided in the general election year, and these Delegates and Alternates elected under this option shall hold office for a term of one year, or until their successors are duly elected.

B. All affiliate Delegates and Alternates shall serve a two year term or until their successors are elected. An affiliate Delegate or Alternate may not be a regular party Delegate or Alternate to the same convention. Affiliate Delegates and Alternates to Congressional District conventions must reside in the Congressional District and must be elected by the affiliate members who reside in the Congressional District and will be legally qualified voters in the next general election.

C. In compliance with the rules of the Republican National Convention, no Delegate or Alternate may be an automatic Delegate or Alternate. Each Delegate or Alternate must be elected by his/her respective convention. Delegates and alternates to the Republican National Convention may be bound to cast his/her vote for a particular candidate. The state executive committee will have the authority to create binding rules for the state and congressional districts. The rules will be in accordance with rules promulgated by the Republican National Committee.

**SECTION 6:** Vacancies.

At all levels within the party a vacancy shall occur in a Delegates position upon his/her death, resignation or removal from the geographical area from which he/she was elected, or upon the failure of the body having the power of election to fill such position, if no duly elected Alternate is available to fill the vacancy. Vacancies shall be filled in the same manner as the original Delegate or Alternate was elected.

**SECTION 7:**

Nothing in this Article is intended to affect the right of the convention to authorize, by rule, the Delegates present to vote the entire voting strength of the BPOU.

**ARTICLE VI**  
**State Convention**

**SECTION 1:** Composition.

State conventions shall be composed of the following:

A. Delegates from various BPOUs of the state who are elected at their conventions. The number of Delegates from the various BPOUs shall be apportioned among the BPOUs upon such basis as the State Executive Committee or the State Central Committee may determine, provided that the basis of apportionment shall be uniform throughout the state, and shall be based upon the vote for the Republican candidate for Governor in the last preceding statewide general election; or, if such election were a presidential election, the vote cast for the Republican candidate for President. If the number of Delegates apportioned to a BPOU is less than two, the total number of Delegates shall be increased to a minimum of two Delegates for each BPOU.

B. Subject to Article V, Section 5, B., two Delegates and two Alternates elected by each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.

**SECTION 2:** Committees.

State convention committees consisting of a platform committee, a rules committee, a credentials committee, a nominating committee and such other state convention committees as may be necessary or desirable shall be organized. Members in each committee shall be appointed as follows:

A. An equal number of members from each Congressional District to be appointed by the district chair(s) of the respective Congressional District.

B. Members at large to be appointed by the state party chair, the number of which is not to exceed

15% of the total membership of any committee.

C. A chair to be appointed by the state party chair.

**SECTION 3: Nominations Committee.**

A. To be eligible to be considered for endorsement or election, candidates for statewide endorsement and candidates for National Delegate or Alternate must meet all legal requirements and submit nominating petitions to the Nominating Committee containing the printed names and signatures of a minimum of 2% of the State Convention Delegates.

B. The Nominations Committee shall report to the convention those candidates who have met the petition and legal requirements at Section 3A and whether the Nominating Committee deems the candidates to be qualified or unqualified to receive endorsement or be elected.

**SECTION 4: Rules Committee.**

The Rules Committee report shall be mailed at least seven (7) days in advance of the convention.

**SECTION 5: Platform Committee.**

A. The function of the platform committee shall be to maintain a permanent platform for the Republican Party of Minnesota based upon the platform adopted at the previous regular Republican State Convention. The permanent platform may only be amended as provided in this constitution and the rules of the state convention. The committee will be responsible for performing the work described in subsection C. below.

B. The platform committee shall meet in even numbered years at the call of its chair or the state party chair. The final committee report shall be presented to the state party chair and be mailed to convention Delegates and Alternates at least seven (7) days prior to the state convention. The committee shall then present the final committee report to the state convention to be voted on in the manner prescribed by this constitution and the rules of the convention.

C. In even numbered years the platform committee shall review the permanent platform and all of the resolutions passed at Congressional District conventions for Congressional Districts that have a representative on the platform committee and any additional resolutions brought to the committee in the manner prescribed by the state convention rules. The committee shall determine which resolutions are new resolutions (i.e., address issues that are not addressed in the current permanent platform). The committee will recommend to the state convention the following changes:

1. Adoption of the new resolutions identified by the committee;
2. Renewed adoption of any resolution of the platform designated to sunset;
3. Elimination of those resolutions that are no longer germane;
4. Combining those resolutions that are similar;
5. Clarifying those resolutions that are confusing;
6. Reconsideration of those resolutions that are in conflict with other resolutions; and
7. Any resolution submitted by a majority of Congressional Districts shall be included in the platform committee final report.

The Committee has discretion to make recommendations to the state convention to limit the size of the platform including a recommendation to designate resolutions of the platform for sunsetting.

D. All motions related to the platform committee report shall be voted upon at the state convention in the manner prescribed in the convention rules and need to be adopted by a minimum of sixty (60) percent of the last credentials report.

E. The creation of a permanent platform for the Republican Party of Minnesota will not limit the authority of any BPOU or Congressional District with respect to adopting their own platform.

**SECTION 6: Time and Place of Convention.**

A state convention of the party shall be held in each general election year as required by Minnesota State Statutes, at such time and place as the State Central Committee may determine. Special state conventions may be called at such other times and places and for such purposes as the State Central Committee may determine.

**SECTION 7: Issues Conference.**

In odd-numbered years the State Central Committee may organize a conference of party activists for the purpose of studying issues of topical interest to the Party. The conference shall be open to all interested Republicans and shall not be limited to State Convention Delegates and Alternates.

**SECTION 8: Presidential Electors.**

A. Presidential Electors shall be nominated by the State Convention in the year of each Presidential election as follows: (i) two (2) Presidential Electors shall be nominated at-large by the State Convention Delegates in accordance with the rules of the State Convention; and (ii) each Congressional District shall place in nomination one (1) Presidential Elector (a Congressional District Elector-Nominee) as provided in Article VII, Section 3, who shall be nominated by the affirmative vote of the State Convention, in accordance with the Rules of the State Convention.

B. Each Congressional District shall report to the State Convention the name of that Congressional District's Congressional District Elector-Nominee in the manner provided in the Rules of the State Convention.

C. If a Congressional District fails to select a Congressional District Elector-Nominee or a Congressional District Elector-Nominee is unable or unwilling to serve as a Presidential Elector prior to being nominated by the State Convention, a substitute Congressional District Elector-Nominee shall be placed in nomination in accordance with the Constitution or Bylaws of the Congressional District. If no provision exists in the Congressional District's Constitution or Bylaws for a substitute Congressional District Elector-Nominee, the Presidential Elector to be placed in nomination by that Congressional District shall instead be nominated by the State Convention Delegates in the manner provided for an at-large Presidential Elector as set forth above.

D. No person shall be nominated a Presidential Elector unless that person has been selected as a Congressional District Elector-Nominee or nominated at-large as provided herein.

E. If any Presidential Elector that has been nominated by the State Convention is unable or unwilling to serve after the state convention, the state executive committee shall nominate a replacement from the geographic body that nominated the original Presidential Elector.

**ARTICLE VII**  
**Congressional District Conventions**

**SECTION 1: Composition.**

Congressional District conventions shall be composed of the following residents of the district:

**A.** Delegates apportioned to and elected at the BPOU convention, in the same manner as Delegates to state conventions.

Any BPOU that crosses Congressional District lines shall allot its apportioned Delegates to the Congressional Districts using the Republican vote cast for either Governor or President in the most recent general election. The manner of election shall be determined by the BPOU constitution, bylaws or by a motion of its convention.

**B.** Subject to Article V, Section 5, B., one Delegate and one Alternate who are residents of the Congressional District elected at a Congressional District caucus held by any of the statewide affiliate organizations as listed in the party bylaws, provided that the affiliate has at least ten eligible members residing in the Congressional District.

**SECTION 2: Time and Place of Convention.**

Congressional District conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, or the committees of the respective Congressional District, and at such other times and for such other purposes as the committee calling the conventions may determine. The Congressional District committee shall determine the place of holding Congressional District conventions in each district.

**SECTION 3: Presidential Elector Nominees.**

**A.** In each Presidential election year, each Congressional District shall be entitled to place in nomination one (1) person to be that Congressional District's Congressional District Presidential Elector-Nominee. A Congressional District Presidential Elector-Nominee may be selected by: (a) the affirmative vote of the Congressional District's Delegates at the Congressional District Convention held in a Presidential election year in accordance with the rules of the District Convention; or (b) by that Congressional District's District Convention Delegates in the manner provided in the Congressional District's constitution.

**B.** Each Congressional District Elector-Nominee shall be reported to the State Convention and nominated by the State Convention as provided in Article VI, Section 8 of this Constitution.

**ARTICLE VIII**  
**Basic Political Organizational Unit Conventions**

**SECTION 1: Composition.**

BPOU conventions shall be composed of the following residents of the BPOU:

Delegates elected at the precinct caucuses that are held in each precinct every general election year as required by Minnesota statutes. The number of Delegates and Alternates at each convention and the basis of their apportionment shall be determined by the BPOU committee, provided that such basis shall be uniform throughout the BPOU and shall be based on the vote cast for the Republican candidate for Governor in the past preceding statewide general election; or if such election were a presidential election, the vote cast for the Republican candidate for President. Special caucuses for one or more precincts may be called by the BPOU committee in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies in precincts where such exist at the time of notice.

**SECTION 2: Time and Place of Convention.**

BPOU conventions shall be held annually within a range of dates established by the State Central Committee and at the call of the State Executive Committee, the State Central Committee, the Congressional District committee or the BPOU committee. The conventions shall precede Congressional District and state conventions. Special BPOU conventions may be held at the call of the State Executive Committee, the State Central Committee, the Congressional District committee, or the BPOU committee at such time and for such purpose as the committee calling the same may determine. BPOU conventions shall be held at a place determined by the respective committee issuing the call.

**SECTION 3: Delegates and Alternates to State and Congressional District Conventions.**

Delegates and Alternates to the Congressional Districts and to state conventions shall be elected at the BPOU conventions in even numbered years; or if provided in the BPOU constitution may be elected annually. A BPOU may elect up to twice as many Alternates as the number of Delegates allotted, provided that the BPOU convention or constitution specifies a method for the orderly seating of said Alternates to fill vacancies in the delegation. The qualifications to be elected a Delegate or Alternate are residence in the electing unit and being a legal and qualified voter in the next general election. All disputes concerning the seating of Alternates shall be settled according to that BPOU's constitution or bylaws. If seating of Alternates is not addressed in the BPOU's constitution or bylaws, then a caucus of the Delegates from that BPOU will meet to settle the issue.

**ARTICLE IX**  
**State Party Administration**

**SECTION 1: State Central Committee.****A. General Management.**

The general management of the affairs of the party in the state shall be vested in the State Central Committee, subject to the control of the state convention and this constitution.

**B. Composition.**

The State Central Committee shall consist of the following:

**1. The Members of the State Executive Committee and the Congressional District Chairs.**

Where the Congressional District constitution provides for one chair and one deputy chair instead of two chairs, the chair and the deputy chair will be members of the State Central Committee. The Congressional District chairs and Congressional District representatives to the State Executive Committee may appoint a designee to serve in their absence provided that the designee is either a State Central Committee Alternate or Congressional District officer from his/her Congressional District. The state party officers, the national committeeman and committeewoman, and the state finance chair may appoint a designee to serve in their absence provided that the designee is a State Central Committee Alternate or Congressional District officer.

**2. One Delegate-at-large from each Congressional District.**

If a Congressional District constitution provides for a Congressional District representative to the State Executive Committee other than a Congressional District chair, then this person will be the Congressional District Delegate-at-large. If a Congressional District constitution provides that a chair will represent the Congressional District on the State Executive Committee, then the Congressional District shall elect in accordance with its constitution a Delegate-at-large and an Alternate in odd numbered years from within the Congressional District.

**3. One Delegate and one Alternate, elected from each of the statewide Republican Party affiliate organizations as listed in the party bylaws, provided that the affiliate has at least twenty-five (25) eligible members.**

**4. 300 Delegates and up to three times as many Alternates apportioned among the Congressional Districts, determined by the ratio of each Congressional District's Republican vote in the last general election for President or Governor. Congressional Districts shall further apportion all of their Delegates to their BPOUs, and no BPOU or portion thereof may be disenfranchised. The Congressional District shall determine the method for ensuring enfranchisement. Nothing herein shall be construed to require that every BPOU fragment qualify for its own Delegate or Alternate.**

The Delegates and Alternates shall be elected in odd numbered years from within the Congressional District in accordance with the provisions of the Congressional District constitution. A Congressional District Delegate or Alternate elected pursuant to this section shall serve a two year term commencing on the date of his/her election

and terminating on the date his/her successor is elected. Such Delegates and Alternates must reside in the Congressional District and be eligible to be a legally qualified voter in the next general election.

In the event that any Congressional District Delegate and one of his or her Alternates are unable to attend a meeting of the State Central Committee, the Congressional District constitution shall provide for a procedure for appointment of a replacement from among the other Alternates elected in that Congressional District.

A vacancy in a Congressional District Delegate position shall be filled for the unexpired term by one of his or her Alternates if any, otherwise a vacancy in a Delegate or Alternate position may be filled for the unexpired term by the respective body of officers having power of appointment or election.

5. Each Republican state constitutional officer and each Republican member from Minnesota of the United States Senate or the House of Representatives, or his/her appointee, shall be a member of the State Central Committee for the duration of his/her term of office.

6. The Speaker of the Minnesota House of Representatives, if a member of the Republican Caucus or his/her appointee (otherwise the leader of the House Republican Caucus or his/her appointee) and the leader of the Republican Caucus in the Minnesota State Senate or his/her appointee.

**SECTION 2: State Executive Committee.**

**A. Composition.**

The State Executive Committee shall consist of the following:

1. The state chair, deputy chair, secretary and treasurer;
2. The national committeeman and committeewoman;
3. One district chair from each Congressional District or a Congressional District representative as provided for in the Congressional District constitution or bylaws who shall serve until a successor is elected;
4. The state finance chair.

**SECTION 3: State Party Officers.**

*[Prior to the election of a Chair in 2013, the positions of Secretary and Treasurer shall remain as one position.]*

**A. Composition.**

The state party officers shall consist of the following:

1. Chair
2. Deputy chair
3. Secretary
4. Treasurer

**B. Elections, Terms and Removals**

1. The State Party Chair, Deputy Chair, and Secretary shall be elected at large by the State Central Committee in accordance with the bylaws or upon the occurrence of a vacancy, as provided in clause 4 below.

2. At the first Executive Committee meeting after the election of a Party Chair or in the event of a vacancy in the Treasurer position, the Executive Committee shall elect a Treasurer by a 2/3 majority vote of the full membership of the Executive Committee. The

Treasurer cannot simultaneously hold any other state party officer position.

3. State party officers shall not serve more than four (4) consecutive full terms in the same office. Unless otherwise provided, each party officer shall serve a two year term in accordance with the procedures established in the bylaws.

4. (i) Any state party officer may be removed by a two-thirds vote of the full membership of the State Executive Committee and confirmation by a vote of a simple majority of those present at the next meeting of the State central Committee. This party officer's position shall be considered vacant until the next State Central Committee meeting (ii) Any state party officer may be removed by a two-thirds vote of those present at any meeting of the State Central Committee.

5. In the event of a vacancy in the office of state chair, the deputy chair shall carry out the duties of the chair until a new state chair is elected and the State Central Committee shall meet within forty-five (45) days thereafter to elect a new state chair. In the event of a vacancy in the office of deputy chair, secretary, or treasurer, the state chair may appoint

an acting deputy chair, secretary, or treasurer subject to ratification by the State Executive Committee within thirty days after the appointment, to carry out the duties of the vacant office until a new officer is elected. The State Central Committee shall elect a new deputy chair or secretary at its next regularly scheduled meeting or, if such meeting is scheduled within thirty days after the vacancy occurs, at the second regularly scheduled meeting after the vacancy occurs.

#### **SECTION 4: General Provisions Relating to State Party Administration. A.**

##### **Terms of Appointees.**

Unless otherwise provided, persons appointed by a state party officer under this constitution shall have terms of office expiring with the expiration of the term of the appointing officer. Each such person may be removed at the discretion of the appointing officer. In the case of the death, removal from office or geographical area, or resignation of the appointing officer the persons appointed by such state party officer shall have terms expiring with the election by the State Central Committee of the new state party officer.

B. No state party officer shall hold his or her office and at the same time receive monetary or inkind payment from any candidate or its campaign.

C. The state chair and deputy chair shall meet with the Congressional District chairs as a group at least once every three months.

### **ARTICLE X**

#### **Congressional District Party Administration**

#### **SECTION 1: Congressional District Committee. A.**

##### **Duties and Responsibilities.**

The management of the affairs of the party pertaining to each Congressional District shall be vested in the Congressional District committee of such Congressional Districts, subject to the direction of the State Central Committee, the State Executive Committee, and the Congressional District convention, provided that the Congressional District committee shall have no jurisdiction over local affairs within the respective BPOUs in the Congressional District.

##### **B. Composition.**

The composition of each Congressional District committee shall be provided in their respective Congressional District constitution and/or bylaws.

##### **C. Officers.**

The officers of each Congressional District committee shall be at least one chair, a treasurer and such additional officers as may be determined by each Congressional District constitution and/or bylaws.

**D. Election of Officers.**

The Delegates to each Congressional District convention held in odd numbered years shall elect the officers of the Congressional District committee from any members of the party residing within the district.

**SECTION 2: Congressional District Executive Committee.**

The Congressional District Executive Committee shall consist of the officers of the Congressional District committee and such additional members as provided by the respective Congressional District constitution and/or bylaws.

**SECTION 3: Removals.**

Unless a Congressional District constitution or bylaws provide otherwise, any officer of a Congressional District committee, or any member of the Congressional District Executive Committee, may be removed by a two-thirds vote of those committee members present at the Congressional District or Congressional District Executive Committee meeting, as applicable.

**SECTION 4: City Committees.**

For cities of the first class (and for cities located wholly within Hennepin County having a population of 75,000 or more), it shall be responsibility of the respective Congressional District committee to organize or cause to be organized such cities and wards thereof, located within their Congressional District, for city elections. The Congressional District committee may determine the number of Delegates and Alternates for such a city or ward convention and the basis of their apportionment, provided that such basis shall be uniform throughout the city and the wards thereof, and if such Delegates and Alternates are elected at the precinct caucuses held in even numbered years the apportionment shall be based on the Republican Party vote in the last general election for President or Governor. The constitution and/or bylaws of the respective Congressional District shall provide for the establishment of a city committee for such a city. A Congressional District may also give power and responsibilities to such a city committee, including the authority to elect officers and to call endorsing conventions for city office, subject to the provisions of the Congressional District constitution and/or bylaws.

**ARTICLE XI**  
**Basic Political Organizational Unit Administration**

**SECTION 1: BPOU Committee.**

**A. Composition.**

The BPOU committee shall consist of the BPOU party officers and such other members as the BPOU constitution, bylaws, or convention may prescribe.

**B. Officers.**

The officers of each BPOU shall be at least one chair and such additional officers as may be determined by each BPOU constitution and/or bylaws.

**C. Election of Officers.**

The officers and other members of the BPOU committee shall be elected at each BPOU convention held in odd numbered years.

**D. Management and Fundraising.**

The management of the affairs of the party within the BPOU shall be as set forth in Article IV. Organizers or other representatives of state or Congressional District authorities shall not solicit membership or funds at an event held within any BPOU without at least 14 days written prior notice to the BPOU chair(s). (See Article IV, Section 2.)

**SECTION 2: BPOU Executive Committee.**

The BPOU convention may provide for a BPOU executive committee of such size as it deems proper, which shall be members of the BPOU committee.

**SECTION 3: Removals.**

Unless a BPOU constitution or bylaws provide otherwise, any BPOU representative on a Congressional District committee, or officer of a BPOU executive committee may be removed by a two-thirds vote of those members present at a BPOU committee meeting.

**SECTION 4: Vacancies in Precinct Offices.**

The BPOU chairman or chair with the approval of the BPOU committee may call a special caucus, for one or more precincts, in the manner prescribed by statute for biennial precinct caucuses for the sole purpose of filling vacancies where such exist at the time of notice, or may provide for the appointment of an acting officer until an officer is duly elected.

**ARTICLE XII**  
**Judicial District Organization and Administration**

**SECTION 1:**

A Judicial District convention may create and organize a Judicial District Committee. A notice of intent to consider forming a Judicial District Committee shall be included in the call of the convention along with the proposal to consider endorsement. If such committee is created and organized, it shall be strictly auxiliary to the Republican Party of Minnesota and shall have no other powers except as provided herein. If a Judicial District Committee is formed, it shall search for candidates for judicial office. If a convention endorses for a judicial office under Article V, Section 3(H), the Judicial District Committee shall be responsible to secure the election of the endorsed candidate.

**ARTICLE XIII**  
**National Committeeman and Committeewoman**

**SECTION 1: Selection of National Committeeman and National Committeewoman.**

In the year of each presidential election, immediately before or immediately after the state convention that precedes the Republican National Convention, the State Central Committee shall meet and select a national committeeman and a national committeewoman.

**ARTICLE XIV**  
**Affiliates**

**SECTION 1: Purpose and Organization.**

The right of special organizations having Republican affiliations to exist and carry on their activities as they see fit, consistent with the object, platforms, and principles of the party shall be recognized. The organization of permanent local clubs and organizations of party members for the purpose of holding meetings and carrying on other activities in furtherance of party and public welfare shall be permitted and encouraged. The activities of all such organizations during the election campaigns shall be coordinated with authorized party activities and subject to the direction of the regularly constituted party organizations.

**SECTION 2: Procedures for Determining Affiliate Status.****A. Organizational Requirements for Affiliate Status.**

Each Organization applying to be recognized as an Affiliate Organization of the Republican Party of Minnesota shall submit to the State Party Chair a copy of its constitution, bylaws, any other governing documents and an Executive Officer roster of the organization. The organization shall hold a convention at least bi-annually to elect officers and delegates/alternates as applicable.

Unless otherwise provided in the organization's constitution and/or bylaws, such convention shall be subject to the requirements in Article V.

**B. Procedures for Determining Affiliate Standing.**

The State Executive Committee shall review all affiliates' standing on a yearly basis. Written notice must be sent to the presiding officer of the affiliate no later than twenty (20) days prior to a State Executive Committee meeting at which the affiliate's standing will be reviewed. The State Executive Committee shall annually forward its recommendation of affiliates in good standing to the State Central Committee to be certified by the State Central Committee.

**SECTION 3:**

**Representation at State and Congressional District Conventions**

Authorized statewide Affiliates shall be entitled to voting representation at Republican State Conventions in accordance with Article VI, Section 1, B. Authorized statewide Affiliates may be entitled to voting representation at Congressional District Conventions, subject to qualification, in accordance with Article VII, Section 1, B.

**ARTICLE XV**  
**Constitution and Bylaws, Committee and Amendments**

**SECTION 1:**

**Constitution and Bylaws Committee.**

The Constitution and Bylaws Committee shall consist of a chair, and two persons from each Congressional District. The state party chair shall appoint the chair of the Constitution and Bylaws Committee. The Congressional District representatives shall be appointed by the Congressional District chair(s), or in the event of a dispute between the chairs regarding the appointment, by the Congressional District Executive Committee.

The Constitution and Bylaws Committee shall give consideration to and may propose appropriate amendments and/or revisions of the Constitution to the state convention. The Constitution and Bylaws Committee shall also give consideration to and propose appropriate amendments of the bylaws to the State Central Committee. One third of the committee members shall constitute a quorum.

Any member of the Constitution and Bylaws Committee shall have the privilege of addressing the state convention or the State Central Committee when any report of the Constitution and Bylaws Committee is being considered.

**SECTION 2:**

**Amendments to the Constitution.**

This constitution may be amended by a majority vote at any state convention, provided that any proposal for amendment shall be referred to the state Constitution and Bylaws Committee and reported out of said committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the convention.

**SECTION 3:**

**Bylaws.**

The State Central Committee and State Executive Committee shall operate under such bylaws as are deemed necessary for the transaction of the business of the party. The bylaws shall contain the specific delegation and division of responsibilities and duties among the various departments of the state organization and may specify whatever rules and administrative procedures the State Central Committee deems necessary.

**SECTION 4:**

**Amendments to the Bylaws.**

The bylaws may be amended by a two-thirds (2/3) vote at any State Central Committee meeting after written notice of any proposal for amendment has been submitted with the notice of the meeting. Any proposal for amendment shall be referred to the state Constitution and Bylaws Committee. Any minority report shall be signed by at least one-third (1/3) of committee members before it shall be submitted to the State Central Committee Meeting.

**ARTICLE XVI**  
**General Provisions**

**SECTION 1: Other Constitutions and Bylaws.**

Any body within the party organization may adopt and amend a constitution and/or bylaws for its own government not inconsistent with this constitution.

**SECTION 2: Removals.**

Notice of every proposal for removal by any committee or other body of the party shall be included in the notice of the meeting, and the individual concerned shall be served with a detailed statement of the charges against him/her at least ten days prior to such meeting.

**SECTION 3: Vacancies.**

A. All vacancies shall be filled for the unexpired term by the respective bodies or officers having power of election or appointment, except officers or members of the Congressional District or BPOU committees that shall be filled by such committees.

B. A vacancy shall occur upon the death or resignation of an officer or committee member or upon his/her removal from the geographical area from which he/she was elected.

**SECTION 4: Financial Data/Congressional District/Basic Political Organizational Unit, and Legislative District Budgets.**

A. Upon request by the state party treasurer, the financial officer of any organization recognized under this constitution including but not limited to each Congressional District, each BPOU/Legislative District organization and affiliate shall prepare biennial budgets or submit financial data pertaining to the organization for review and shall submit financial data to the state party treasurer.

B. The party treasurer shall report at least semiannually on the financial status of the state party to members of the State Central Committee.

C. All money received in the name of the Republican Party of Minnesota shall be deposited in its account. All money received shall be reported by the state party treasurer along with copies of any reports required by state or federal law.

D. No contribution shall be accepted and a unit of the party shall make no expenditure at a time when the office of treasurer of the respective unit is vacant.

**SECTION 5: Improper Use of Party Funds.**

No loan, in any form, may be made to any individual or party officer. In the event that any party officer, at any level of the Republican Party of Minnesota, converts to his/her own use any Republican Party funds, other party officers shall report such occurrence to the Chair of the Republican Party of Minnesota, diligently encourage and assist all law enforcement personnel in prosecuting the violator to the full extent of the law and shall work diligently to recover the misappropriated party funds.

**ARTICLE XVII**  
**Parliamentary Authority**

The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the party in all cases to which they are applicable and in which they are not inconsistent with the constitution and bylaws of the Republican Party of Minnesota, the statutes of the State of Minnesota, or any special rules of order the party may adopt.

Amended May 2016

CONSTITUTION - PAGE 18

**EXHIBIT 10**

## **Judicial Election Committee Minority Report**

**By David Asp & Harry Niska**

We dissent from both:

- The JEC majority's decision to withhold important information from the convention regarding Michelle MacDonald's qualifications as a candidate; and
- The JEC majority's decision to recommend Michelle MacDonald for endorsement.

### **I. The JEC again withheld important information from the Convention.**

- The JEC met with MacDonald for more than 2 hours to discuss her candidacy. During that meeting, MacDonald's responses to questions raised many concerning facts that could be damaging both to the candidate and the party.
- **But the majority on the JEC voted not to disclose any of those facts in its majority report. In fact, the majority actually took a formal vote not to inform the convention that MacDonald filed a legal complaint against the Republican Party in 2014 and was unwilling to commit not to bring such a complaint in the future.**
- The JEC's decision to withhold important information from convention delegates harkens back to 2014, when the JEC failed to disclose several relevant facts before MacDonald was endorsed. We hoped JEC would act in a more transparent manner in 2016. We were disappointed.
- The JEC's refusal to provide delegates with a complete picture of the controversies surrounding MacDonald is detrimental to the party and the party's process for endorsing candidates.

## II. The JEC should not have recommended Michelle MacDonald for endorsement.

- **Endorsing MacDonald will bring harm to the party**

- As was the case in 2014, there is (and will be) extraordinary opposition by Republicans to this candidacy, and an endorsement will result in division.
- In 2014, MacDonald filed a frivolous OAH complaint against the party that was thrown out as not legally founded. In our interview and follow up written questions, MacDonald was asked to rule out ever suing the party again. She would not do so; instead MacDonald said she did not “desire” to sue to the party.

- **MacDonald is not qualified and would not be an effective judge**

- Delegates should expect higher qualifications of a candidate than the minimum qualifications of having a law degree. Potential judges and justices should have demonstrated expertise, legal skill, and be able to effectively and persuasively defend their judicial philosophy.
- We do not believe MacDonald can articulate or defend her judicial philosophy. Although MacDonald claims to be an “originalist,” she was unable to explain why or explain what an “originalist” judicial philosophy means.
- During the interview, MacDonald failed to articulately discuss any constitutional views beyond buzzwords and headlines. For example, she asserted that she had a difference of opinion with Justice Hudson on the First Amendment that she planned to make an issue in the campaign, but when asked to explain, she was not able to articulate this supposed difference.
- When asked for examples of her legal work, MacDonald submitted samples of written briefs. The briefs propounded dubious constitutional theories, including expansion of substantive due process beyond the scope of current law.
  - In particular, she argued in an amicus brief to the Minnesota Supreme Court that the US Constitution prohibits Minnesota state courts from issuing no-contact orders with children. It is important

to note that this amicus brief was on behalf of her own non-profit organization, so she was not simply representing a client's private interests, she was choosing to advocate for this legal position.

- This argument is legally dubious, and profoundly opposed to conservative jurisprudence, by asserting that federal law ties the hands of the states in family law -- a quintessential state issue -- and by embracing, and attempting to extend, the doctrine of substantive due process.
- **MacDonald has demonstrated a lack of appropriate judicial temperament**
  - In at least three incidents, in publicly available video, she has demonstrated a volatile and confrontational temperament
    - Detained in Dakota County court for disobeying court officers
    - Stopped for DUI
    - 2014 MNGOP State Fair booth incident
  - MacDonald has repeatedly shown a lack of respect for law enforcement and judges.

---

### ***Our recommendations***

- **On question of considering judicial endorsements:** Because only one candidate is seeking an endorsement, and we believe that an endorsement of that candidate is imprudent, we recommend a **No vote** on this question.
- **On question of endorsing Michelle MacDonald for Minnesota Supreme Court:** If the initial motion passes and judicial endorsements are considered, we recommend voting **No endorsement** on the question of endorsing for Minnesota Supreme Court.

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wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

### **Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- 

**More information:** Candidate website

*The information on this page was provided by the candidate.*

MacDonaldforJustice



MICHELLE MACDONALD  
MacDonaldforJustice.com  
Michelle@MacDonaldforJustice.com  
Direct: 612-554-0932

August 31, 2016

Star Tribune Media Company LLC  
ATT: Jannette Gonzales  
650 3rd Ave. South, Suite 1300  
Minneapolis, MN 55488

Via Mail and Facsimile: 612-673-4359  
email:opinion@startribune.com

August 31, 2016  
**Re: Supreme Court Candidate Michelle MacDonald  
False and Misleading Article by Editorial Board, August 1, 2016**

Dear Editorial Board and Jannette Gonzales:

On Monday, August 1, 2016, the Star Tribune ran an article by the "Editorial Board" entitled "Natalie Hudson is 'clear choice' for Minnesota Supreme Court", with the subtitle "Her opponents lack her outstanding experience and temperament". I am writing to you as one of her "opponents." I have copied this article to Craig Foss. This article ran a week before the primary election, Tuesday, August 9, 2016.

The conclusion reached about me and Mr. Foss, that we were "not qualified for the office" represents a lie to Minnesota voters, and an inappropriate endorsement of a Candidate by your newspaper.

Pursuant to the Minnesota Constitution, and the laws of our state, all of the judicial candidates were qualified. Our Minnesota Constitution, Article VI, section 5, specifically addresses the qualifications that a "Judge of the Supreme Court" shall be "learned in the law".

Your article, and the conclusion you reached that we were "not qualified", represents a "clear" misrepresentation to your readers, as all three of us were qualified by the terms of the Minnesota Constitution, and the facts. The detailed Candidate Questionnaires you solicited represent that we were "learned in the law." Mine and Mr. Foss' Candidate questionnaires are attached.

I would ask that you immediately publish the Candidate questionnaires for myself and Mr. Foss (attached), and that of Natalie Hudson so that your readers can determine for



themselves our qualifications to make an informed decision as to Ms. Hudson and myself when they vote on Tuesday, November 8.

Your published statement about me was defamatory in nature and should promptly be retracted. You stated:

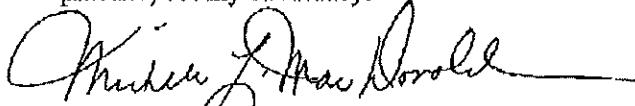
"The other candidates in this race are not qualified for the office they seek. Michelle MacDonald, 54, is a private attorney with an independent practice specializing in family law, founder of a nonprofit focused on keeping families out of court and resolving disputes."

You also falsely represented that "the State GOP declined to endorse MacDonald this year." The truth is that I was recommended for endorsement by the Judicial Selection Committee, and the state GOP changed their judicial endorsement process, declining to endorse any judicial candidate at the convention, not particular to me. You can watch the video on UPTAKE to determine for yourself the engineering and confusion that transpired with the voice vote "Y" or "Nay".

You should also be aware that the Judicial Selection Committee was made up of 2 representatives from each of Minnesota's ten (10) Judicial Districts, and that all of those representatives (who were non-lawyers) *unanimously* recommended me for endorsement. However, Keith Downey, the chair of the Republican Party, appointed two young lawyers, Harry Niska and David Asp, to the Committee. Only the two *lawyers* appointed by Mr. Downey voted against recommending me for endorsement. As such, your statement that the Republican Party declined to endorse *me* in this 2016 election is misleading.

We would expect this particular article that conveys false and defamatory information be retracted no later than *Thursday, September 15, 2016*. Our suggestion would be to specifically address the qualifications required by the Minnesota Constitution, by publishing our respective Questionnaires, with a link to a recording of the interviews as available.

This action will serve to mitigate damages to me and my law firm. Material omissions are also a form of fraud and defamation, and implicate criminal statutes as well. I am running for Minnesota Supreme Court, and such false statements impact not only my law practice, but my candidacy.



Michelle L. MacDonald  
1069 South Robert Street, Suite U  
West St. Paul, Minnesota 55118

Cc. Craig Foss

COMPLAINANT EXHIBIT 7

State of Minnesota  
Office of Administrative Hearings  
PO Box 64620  
St. Paul, MN 55164-0620

Docket No. 71-0320-33929

Complaint for violation of the Fair Campaign Practices Act  
Minn. Stat. § 211B.02 (2016)

Complainants' Hearing Memorandum

Your Complainants continue to rely on the Verified Complaint and the memorandum submitted prior to the probable cause hearing, and the authorities cited therein, especially *Niska v. Clayton*, No. A13-0622 (Minn. Ct. App., Mar. 10, 2014).

Respondent's claim of endorsement by the "GOP Judicial Selection Committee" (Timmer Ex. 1) was false and a violation of Minn. Stat. § 211B.02 (2016) for three reasons:

1. The mere use of the term "GOP" in the original candidate profile supplied by the Respondent to the Star Tribune and published in the voter guide section of the newspaper's website is a violation of the statute when there is no endorsement. *In re Ryan*, 303 N.W.2d 462 (Minn. 1981); *Schmitt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979).
2. The committee referred to by the Respondent does not and never did exist. There was a "judicial election committee" at the time of the 2016 Republican Party of Minnesota convention, but it functioned as a screening committee. Your Complainants do not believe this was a mere slip of the tongue or fingers, but rather an intentional effort to mislead and confuse readers of the Star Tribune into believing that there was a committee of the RPM that "chose" the Respondent, that is, endorsed her.

It didn't. She wasn't "selected" either; she was recommended as qualified for endorsement by the judicial election committee. That's all. The convention declined to act on the recommendation; the convention declined to consider it, much less debate it.

3. The judicial election committee did not have the power of endorsement, either on its own or as a proxy for the Republican Party of Minnesota.

There will be testimony offered at the hearing that the Respondent stated that “real Republicans” endorsed her. The “real Republicans” were obviously the delegates who sat in the convention and declined to endorse the Respondent, Michelle A. MacDonald.

The candidate profile with the false endorsement was published at least as early as October 18, 2016. Complainant Timmer called the false endorsement to the attention of the newspaper the next day. The endorsement of the “GOP Judicial Selection Committee” was removed on or about October 21, 2016.

At the probable cause hearing, the Respondent said that the endorsement claim was removed at *her* request, after she learned about allegations that it was false, out of an “excess of caution.” If this is true, it is evidence of the *mens rea* of a violation of Minn. Stat. § 211B.02 (2016). At all events, the Respondent did not, apparently, request any corrective information to be inserted in the profile.

Complainant Timmer inquired of the newspaper about viewer statistics for the voter guide, and the Respondent’s candidate profile specifically, for the relevant time period, but the paper declined to provide them.

The present case is not the first time, of course, that problems have arisen regarding false claims of endorsement by the Republican Party of Minnesota for judicial candidates. This case is a near-perfect echo of *Niska v. Clayton*. In *Niska*, it was the Judicial District Republican Chairs Committee that was supposed to have done the endorsing; here it the “GOP Judicial Selection Committee.” (There will be testimony that the RPM amended its constitution at the 2016 convention to try to head off problems like the ones on display here and in the *Niska* case.) In each of these cases, the “endorsement” was, well, bogus. And as in the *Niska* case, the claim was published on a web site for a short time, a website published by the respondent Clayton.

In the present situation, however, the website in question is one maintained by the largest circulation newspaper in Minnesota, which promoted its “myVote” section of the website and the candidate profiles therein.

Not only was the false claim of endorsement more likely to have been viewed by many more voters than in the *Niska* case, that case was well known in political circles and could hardly have escaped Respondent MacDonald’s attention, which bears, in the estimation of your Complainants, on the degree of intentionality of the violation.

Penalty considerations are based on the degree of intentionality, the numbers of voters potentially affected, and whether the respondent took "corrective action." If Respondent MacDonald asked that the false claim of endorsement be removed, it wasn't corrective, since no effort was made to correct the false impression created in the minds of voters who had seen profile with the false information. Here, of course is the OAH "penalty matrix" for 211B cases:

Willfulness	Minimal/no impact on voters, easily countered	Some impact on several voters, difficult to correct/counter	Many voters misled, process corrupted, unfair advantage created
Deliberate, multiple violations in complaint, history of violations, clear statute, unapologetic	\$600 - 1,200	\$1,200 - 2,400 and/or Refer to County Attorney	\$2,400 - 5,000 and/or Refer to County Attorney
Negligent, ill-advised, ill-considered	\$250 - 600	\$600 - 1,200	\$1,200 - 2,400 and/or Refer to County Attorney
Inadvertent, isolated, promptly corrected, vague statute, accepts responsibility	\$0 - 250	\$400-600	\$600 - 1,200

The penalty assessed is up to the sound judgment of the Office of Administrative Hearings, but your Complainants submit that the present case is more serious than *Niska v. Clayton* for all of the reasons discussed. There were undoubtedly "many" voters who were misled, and the Respondent's actions were deliberate.

December 20, 2016

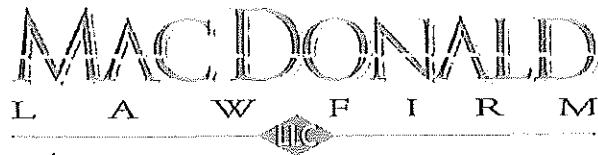
Respectfully submitted,

/s/ Steven J. Timmer

For the Complainants

**RECEIVED**

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December 16, 2016

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Via E-File

Mr. Steven J. Timmer  
5348 Oaklawn Avenue  
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Via Email - [stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com)  
And US Mail

Ms. Barbara J. Linert  
4282 Braddock Trail  
Eagan, Minnesota 55123

Via Email - [barbaraliner@gmail.com](mailto:barbaraliner@gmail.com)  
And US Mail

Re: **In The Matter of Barbara J. Liner & Steve J. Timmer (Michelle MacDonald)**  
**OAH 71-0320-33929**

Everyone:

Pursuant to the Notice of Assignment of Panel and Order For Evidentiary Hearing, dated December 12, 2016, enclosed for filing are the following:

1. Star Tribune Voter's Guide: Submission Confirmation (Original Submission);
2. Star Tribune Voter's Guide: Corrected section.

We intend to call all the following individuals as witnesses in this matter, Timothy Kinley (appearing by phone), Complainants, Barbara Linert and Steven Timmer, and myself, Michelle MacDonald.

We have served a copy of the above items on the complainants by email and US Mail as of today's date.

Thank you for your consideration in this matter.

Very truly yours,

MACDONALD LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Michelle L. MacDonald".

Michelle L. MacDonald  
Attorney at Law

MLM/das

Enclosures

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EXHIBIT 9

## Star Tribune Voter's Guide: *Submission Confirmation*

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Michelle L. MacDonald

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Election:	2016 General Election	Office:	Supreme Court associate justice , Minnesota
Party:	Nonpartisan (NP)	Birthday:	11/05/1961
Gender:	Female	Ethnicity:	White
Mailing Address:	1069 South Robert Street West St. Paul , MN 55118	Daytime Phone:	612-554-0932
		Evening Phone:	612-554-0932
		Phone:	651-222-4400
		Fax:	
City of Residence:	Rosemount	Incumbent:	No
Alternate Contact:	Tom Shimota <i>husband</i>	Alternate Contact Phone:	612-632-4386
Campaign Email:	Michelle@MacDonaldforJustice.com (mailto:Michelle@MacDonaldforJustice.com)	Campaign Website:	<a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> ( <a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> )



**Background:** For 29 years, I am an attorney in the "trenches" helping thousands of people with a variety legal challenges before hundreds of judges at every level including appeals to the Minnesota Supreme Court and the United States Supreme Court of America. For 22 of those years, I have been a small claims court Judge and family court referee. I am founder and volunteer president of [www.FamilyInnocence.org](http://www.FamilyInnocence.org), a nonprofit dedicated to keeping families out of court. I graduated from Boston College, Suffolk University Law School and the Harvard Program of Instruction for Lawyers. I am married with four grown children.

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**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

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**More information:** Candidate website

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Minnesota Office of Administrative Hearings  
P.O. Box 64620  
St. Paul, Minnesota 55164

Via E-File

Mr. Steven J. Timmer  
5348 Oaklawn Avenue  
Edina, Minnesota 55424

Via Email - [stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com)  
And US Mail

Ms. Barbara J. Linert  
4282 Braddock Trail  
Eagan, Minnesota 55123

Via Email - [barbaralinert@gmail.com](mailto:barbaralinert@gmail.com)  
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Re: In The Matter of Barbara J. Liner & Steve J. Timmer (Michelle MacDonald)  
OAH 71-0320-33929

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Very truly yours,

MACDONALD LAW FIRM, LLC

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Michelle L. MacDonald  
Attorney at Law

MLM/das

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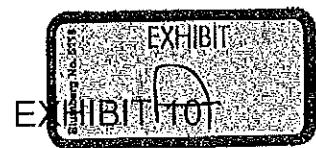


Michelle L. MacDonald

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Mailing Address:	1069 South Robert Street West St. Paul, MN 55118	Daytime Phone:	612-554-0932
		Evening Phone:	612-554-0932
		Fax:	651-222-4400
City of Residence:	Rosemount	Incumbent:	No
Alternate Contact:	Tom Shimola <i>husband</i>	Alternate Contact Phone:	612-532-4386
Campaign Email:	Michelle@MacDonaldforJustice.com (mailto:Michelle@MacDonaldforJustice.com)	Campaign Website:	<a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> ( <a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> )



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Mr. Steven J. Timmer  
5348 Oaklawn Avenue  
Edina, Minnesota 55424

Via Email - [stimmer@planetlawyers.com](mailto:stimmer@planetlawyers.com)  
And US Mail

Ms. Barbara J. Linert  
4282 Braddock Trail  
Eagan, Minnesota 55123

Via Email - [barbaraliner@gmail.com](mailto:barbaraliner@gmail.com)  
And US Mail

Re: In The Matter of Barbara J. Liner & Steve J. Timmer (Michelle MacDonald)  
OAH 71-0320-33929

Everyone:

Pursuant to the Notice of Assignment of Panel and Order For Evidentiary Hearing, dated December 12, 2016, enclosed for filing are the following:

1. Star Tribune Voter's Guide: Submission Confirmation (Original Submission);
2. Star Tribune Voter's Guide: Corrected section.

We intend to call all the following individuals as witnesses in this matter, Timothy Kinley (appearing by phone), Complainants, Barbara Linert and Steven Timmer, and myself, Michelle MacDonald.

We have served a copy of the above items on the complainants by email and US Mail as of today's date.

Thank you for your consideration in this matter.

Very truly yours,

MACDONALD LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Michelle L. MacDonald".

Michelle L. MacDonald  
Attorney at Law

MLM/das  
GOLD Enclosures

Mediation & Arbitration  
A DIVISION OF  
MACDONALD

Saint Paul & Suburbs ♦ 1069 So. Robert Street ♦ W. St. Paul, MN 55118 ♦ Office: (651) 222-4400  
Minneapolis & Suburbs ♦ 3300 Edinborough Way - Suite 550 ♦ Edina, MN 55435 ♦ Office: (952) 746-4243  
Stillwater & Surroundings ♦ 6351 St. Croix Trail ♦ Stillwater, MN 55082 ♦ Office: (651) 455-5529

EXHIBIT 10

## Star Tribune Voter's Guide: *Submission Confirmation*

You have submitted the following information. Please print this page for your records.

You will be notified by email when your profile has been approved and posted on [startribune.com](http://startribune.com). Please review your profile online and contact us with any corrections.



Michelle L. MacDonald

Photo Status: Received on 2016-09-30 03:44:12

<https://s3-us-west-2.amazonaws.com/static.startribune.com/images/elections/candidates/7a4763cd6b524689cf6195fc867228e22094>

Election:	2016 General Election	Office:	Supreme Court associate justice , Minnesota
Party:	Nonpartisan (NP)	Birthday:	11/05/1961
Gender:	Female	Ethnicity:	White
Mailing Address:	1069 South Robert Street West St. Paul , MN 55118	Daytime Phone:	612-554-0932
		Evening Phone:	612-554-0932
		Fax:	651-222-4400
City of Residence:	Rosemount	Incumbent:	No
Alternate Contact:	Tom Shimota <i>husband</i>	Alternate Contact Phone:	612-532-4386
Campaign Email:	Michelle@MacDonaldforJustice.com (mailto:Michelle@MacDonaldforJustice.com)	Campaign Website:	<a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> ( <a href="https://www.MacDonaldforJustice.com">https://www.MacDonaldforJustice.com</a> )



**Background:** For 29 years, I am an attorney in the "trenches" helping thousands of people with a variety legal challenges before hundreds of judges at every level including appeals to the Minnesota Supreme Court and the United States Supreme Court of America. For 22 of those years, I have been a small claims court judge and family court referee. I am founder and volunteer president of [www.FamilyInnocence.org](http://www.FamilyInnocence.org), a nonprofit dedicated to keeping families out of court. I graduated from Boston College, Suffolk University Law School and the Harvard Program of Instruction for Lawyers. I am married with four grown children.

---

**Essay:** We can no longer afford a government "of the lawyers, by the lawyers and for the lawyers." The Constitution exists to uphold fundamental rights we have by virtue of being born into this world --- rights like "the air you breath." Our laws, law enforcement, attorneys and courts regularly fail to recognize and uphold our liberty rights. Instead, to one degree or another, we are deprived of rights to live freely, to our property and resources, and to raise our children. Due process requires clear rules, government adherence to rules, a speedy trial, adequate legal representation and an appellate process. Law enforcement, attorneys and courts often fail to use their discretion wisely, and do not adhere to their own rules in attempts to "persecute" inherently good citizens, who have the right to be left alone if they are not harming anyone. Debtor's prison is supposed to be illegal, yet we can be subject to "pay or else" court orders. After my client sued a Judge, I experienced violations of my civil rights when that judge made me participate in that client's trial in handcuffs, a wheelchair, with no shoes, no eyeglasses, no files and no client for taking a photograph of a deputy. The privilege of judicial immunity must not be seen as permission to violate the law and rights of citizens. Our Judges are often robotic, and lack common sense or humanity in what they do. I envision a unified system of justice, rather than the punitive system that exists.

**Endorsements:**

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016

This site works best when using  (<http://www.google.com/chrome>) ([Google Chrome](http://www.google.com/chrome))  
 (<http://www.mozilla.org>) or  ([Mozilla Firefox](http://www.mozilla.org))  
<http://www.mozilla.org>).

Have questions or problems while using this page?  
Email [votegulde@startribune.com](mailto:votegulde@startribune.com)  
(mailto:votegulde@startribune.com) or call Susan  
Hilliard at (612) 673-7131.

OAH 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

Michelle MacDonald,

Respondent.

The above-entitled matter brought under the Fair Campaign Practices Act came on for an evidentiary hearing on December 21, 2016, before the following panel of Administrative Law Judges: Jessica A. Palmer-Denig (Presiding Judge), Jeanne M. Cochran, and James E. LaFave (the Panel). The record closed at the conclusion of the hearing on December 21, 2016.

Barbara Linert and Steven Timmer (Complainants) appeared on their own behalf and without legal counsel. Erick Kaardal, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Michelle MacDonald (Respondent).

**STATEMENT OF THE ISSUES**

1. Did Complainants demonstrate by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 (2016) by stating that she had the endorsement of the "GOP's Judicial Selection Committee 2016?"
2. If so, what penalty is appropriate?

**SUMMARY OF CONCLUSIONS**

Complainants established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by claiming she was endorsed by the "GOP's Judicial Selection Committee 2016." For this violation, the Panel concludes a \$500 civil penalty is appropriate.

Based on the record and proceedings herein, the undersigned Panel of Administrative Law Judges makes the following:

## FINDINGS OF FACT

1. Respondent was a candidate for the Minnesota Supreme Court in the November 8, 2016, general election.

2. Respondent was invited by the Republican Party of Minnesota's (RPM) judicial election committee to seek the party's endorsement prior to the RPM's state convention.<sup>1</sup> The RPM's state convention was held in Duluth, Minnesota on May 20-21, 2016.

3. The RPM's judicial election committee was a 22-member state convention committee consisting of two members from each of the state's ten Judicial Districts, appointed by their respective Judicial District chairs, and two members appointed by the chair of the RPM.<sup>2</sup>

4. RPM state convention committees are created to assist with carrying out the work of the RPM state convention.<sup>3</sup> These committees are temporary, convention-specific committees.<sup>4</sup> In addition to the judicial election committee, the RPM has the following other state convention committees: a platform committee, rules committee, credentials committee and nominating committee.<sup>5</sup>

5. The RPM's judicial election committee does not have the authority to confer an endorsement.<sup>6</sup> It may only recommend to the state convention delegates that a particular candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals be endorsed by the RPM.<sup>7</sup>

6. Respondent had been endorsed by the RPM two years earlier, in 2014, when she ran unsuccessfully as a candidate for the Minnesota Supreme Court.<sup>8</sup>

7. Approximately one week before the RPM's 2016 state convention, Respondent met with and was interviewed by the RPM's judicial election committee. No other judicial candidate was interviewed.<sup>9</sup> Following that meeting, the judicial election committee voted 20 to 2 in favor of recommending to the party delegates that Respondent be endorsed by the RPM.<sup>10</sup> The two committee members who voted against recommending endorsement for Respondent were Harry Niska and David Asp.<sup>11</sup> Both

<sup>1</sup> Testimony (Test.) of Michelle MacDonald.

<sup>2</sup> Test. of Timothy Kinley; Exhibit (Ex.) 2 at 9 (Art. VI, § 2) and 11 (Art. VI, § 6).

<sup>3</sup> Ex. 2 at 9 (Art. VI, § 2).

<sup>4</sup> Test. of T. Kinley.

<sup>5</sup> Ex. 2 at 9 (Art. VI, § 2).

<sup>6</sup> Test. of Harry Niska and Barbara Linert.

<sup>7</sup> Test. of H. Niska, B. Linert and T. Kinley.

<sup>8</sup> Test. of H. Niska.

<sup>9</sup> *Id.*

<sup>10</sup> Test. of H. Niska and M. MacDonald.

<sup>11</sup> *Id.*

Messrs. Niska and Asp were appointed to the committee by Keith Downey, chair of the RPM.<sup>12</sup>

8. The RPM's constitution in effect at the time of the RPM's 2016 state convention provided that, following the report of the RPM's judicial election committee, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, the delegates would then vote on whether to confer endorsement on specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.<sup>13</sup>

9. At the RPM's state convention in 2016, Diane Anderson, the chair of the judicial election committee, offered the committee's majority report recommending that Respondent be endorsed by the RPM.<sup>14</sup>

10. Following the presentation of the judicial election committee's majority report, Mr. Niska offered a minority report recommending against endorsing Respondent.<sup>15</sup>

11. Ultimately the delegates voted against endorsing any candidates for the Minnesota Supreme Court or Minnesota Court of Appeals.<sup>16</sup> As a result, Respondent was not endorsed by the RPM.

12. Following the 2016 state convention, the RPM amended its constitution to eliminate the judicial election committee.<sup>17</sup> Judicial endorsements are now considered by the RPM's nominations committee.<sup>18</sup>

13. Sometime prior to October 18, 2016, Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was posted in a "Voter Guide" section on the newspaper's website.<sup>19</sup> In the "Endorsements" section of her candidate profile, Respondent claimed she was endorsed by:

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016.<sup>20</sup>

<sup>12</sup> Test. of M. MacDonald.

<sup>13</sup> Test. of H. Niska; Ex. 2 at 4 (Art. V, § 3C) and 11 (Art. VI, § 6C).

<sup>14</sup> Test. of H. Niska, M. MacDonald and T. Kinley.

<sup>15</sup> Test. of H. Niska and M. MacDonald; Ex. 4.

<sup>16</sup> Test. of H. Niska.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 3 at 4 (Art. V, § 3C) and 9 (Art. VI, § 3).

<sup>19</sup> Test. of M. MacDonald; Ex. 1.

<sup>20</sup> Ex. 1.

14. The RPM does not have a "judicial selection committee."<sup>21</sup>

15. Respondent's candidate profile with the listed endorsements was initially posted on the *Star Tribune* website on or about October 18, 2016.<sup>22</sup>

16. On or about October 21, 2016, Respondent became aware of comments on a social media site that criticized her claim of endorsement by the "GOP's Judicial Selection Committee 2016."<sup>23</sup>

17. On October 21, 2016, Respondent went to the offices of the *Star Tribune* and requested that her claim of endorsement by the GOP Judicial Selection Committee be removed from her candidate profile.<sup>24</sup> The claimed endorsement was removed from Respondent's candidate profile posted on the *Star Tribune* on-line Voter Guide or about October 21, 2016.<sup>25</sup>

18. On October 25, 2016, Complainants filed their complaint under the Fair Campaign Practices Act with the Office of Administrative Hearings.

19. By Order dated October 27, 2016, the Presiding Administrative Law Judge found the complaint alleged a *prima facie* violation of Minn. Stat. § 211B.02, and set this matter on for a probable cause hearing.

20. By Order dated November 3, 2016, the Presiding Administrative Law Judge found probable cause to believe Respondent violated Minn. Stat. § 211B.02.

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

#### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2016).

2. Minnesota Statutes, section 211B.02 provides as follows:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

<sup>21</sup> Test. of Steven Timmer and B. Linert.

<sup>22</sup> Test. of M. MacDonald.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Test. of S. Timmer.

3. The Complainants bear the burden of proving the allegations in the complaint. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.

4. Complainants have established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by falsely claiming to be endorsed by the "GOP's Judicial Selection Committee 2016."

5. Based on the above violation, it is appropriate to impose a civil penalty in the amount of \$500.

6. The attached Memorandum explains the reasons for these Conclusions of Law and is incorporated by reference.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

**ORDER**

Having been found to have violated Minn. Stat. § 211B.02, Respondent shall pay a civil penalty of \$500 by March 31, 2017.<sup>26</sup>

Dated: December 27, 2016

---

JESSICA A. PALMER-DENIG  
Presiding Administrative Law Judge

---

JEANNE M. COCHRAN  
Administrative Law Judge

---

JAMES E. LAFAVE  
Administrative Law Judge

<sup>26</sup> The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, PO Box 64620, St. Paul MN 55164-0620.

## NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2016), this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-69 (2016).

## MEMORANDUM

Minnesota Statutes, section 211B.02 provides that a candidate may not knowingly make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of “a major political party or party unit or of an organization.”

Complainants maintain that Respondent’s claim of an endorsement by the “GOP’s Judicial Selection Committee 2016” was false and that it falsely implied endorsement of the RPM. Complainants point out that the RPM does not have a “Judicial Selection Committee.” It did have a “judicial election committee” under its then-operative constitution,<sup>27</sup> but this committee had no power to endorse candidates on its own.<sup>28</sup> It only had the authority to recommend candidates for party endorsement.<sup>29</sup> Complainants assert that the word “endorsement” has a specific meaning and requires specific procedures, including a vote in favor of endorsing a candidate by a majority of the delegates at the RPM convention.<sup>30</sup>

Respondent asserts that the Office of Administrative Hearings lacks jurisdiction to consider the complaint because the RPM’s judicial election committee is not a “major political party, party unit or [] organization.” Therefore, Respondent contends that statements concerning the committee’s support or endorsement of her candidacy does not come within the purview of section 211B.02 and cannot form the basis of a violation. Respondent argues the complaint must be dismissed.

The term “organization” is a “simple word with a common usage,”<sup>31</sup> and has been defined in case law as “two or more persons having a joint or common interest.”<sup>32</sup> In *Niska v. Clayton*,<sup>33</sup> the Minnesota Court of Appeals held that section 211B.02 has “broad express reach to protect entities and even individuals from being falsely dubbed as supporters of any candidate.” The Panel concludes that this definition is broad enough

<sup>27</sup> Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>28</sup> Test. of H. Niska and B. Linert.

<sup>29</sup> *Id.*; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>30</sup> Test. of H. Niska and B. Linert; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>31</sup> *Niska v. Clayton*, 2014 WL 902680 at \*9 (Minn. Ct. App. 2014), review denied (Minn. June 25, 2014) (identifying, in a hypothetical, the International Falls Chamber of Commerce as an “organization.”).

<sup>32</sup> See *Snider v. State, Dept. of Transp.*, 445 N.W.2d 578, 581 (Minn. Ct. App. 1989) (citing *Black’s Law Dictionary* (5th ed. 1979)).

<sup>33</sup> *Niska*, 2014 WL 902680 at \*9.

to include the RPM's judicial election committee for purposes of section 211B.02.<sup>34</sup> Respondent's motion to dismiss for lack of jurisdiction is denied.

Respondent also argues that she did not imply that she was endorsed by the RPM in 2016. Instead, she maintains she accurately stated in her *Star Tribune* candidate profile that she was endorsed by the RPM in 2014 and by the GOP's Judicial Selection [sic] Committee in 2016. She insists that her use of the term "selection" instead of "election" was simply a typographical error and not an attempt on her part to indicate she was somehow "selected" by the RPM committee. Respondent contends further that because a majority of the judicial election committee did recommend that she be endorsed by the RPM, she could properly characterize the committee as having "endorsed" her. Respondent also notes that the RPM constitution recognizes that party units representing less than the entire electorate for a particular office may endorse a candidate for public office as an expression of sentiment.<sup>35</sup>

Section 211B.02 provides that a person may not knowingly make a false claim stating or implying that a candidate has the "support or endorsement of a major political party or party unit or of an organization."<sup>36</sup> The Panel concludes that, in the context of section 211B.02, endorsement has a specific meaning requiring more than mere support. By its terms, the statute expressly differentiates between "support" and "endorsement." In interpreting this language, the Minnesota Supreme Court has recognized a distinction between the two words. In *Schmitt v. McLaughlin*, a candidate who was not endorsed by the DFL party used the initials "DFL" on advertisements and lawn signs.<sup>37</sup> The Court concluded that the "use of the initials 'DFL' would imply to the average voter that [the candidate] *had the endorsement or, at the very least, the support of the DFL party.*"<sup>38</sup> Interpreting the words "support" and "endorsement" to have different meanings is also consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.<sup>39</sup> Therefore, the Panel rejects Respondent's argument that the recommendation or support of the judicial election committee constituted an "endorsement."

Candidates are required to use language that specifically and accurately describes the affiliation between themselves and any entities listed in campaign material. For example, candidates may inform voters that they have a connection with a political party by using the terms "member of" or "affiliated with" when the candidate is not endorsed by that party.<sup>40</sup> However, candidates have been cautioned that they must use those words,

<sup>34</sup> See *City of Grant v. John and Karen Smith*, No. 8-0325-33077, NOTICE OF PRIMA FACIE DETERMINATION AND PREHEARING CONFERENCE at 4 (Minn. Office Admin. Hearings, Dec. 21, 2015) (concluding that a municipality may be considered an "organization" for purposes of section 211B.02).

<sup>35</sup> See Ex. 2 at 4 (Art. V, § 3(A)(6)).

<sup>36</sup> Minn. Stat. § 211B.02.

<sup>37</sup> 275 N.W.2d 587 (Minn. 1979).

<sup>38</sup> *Id.* at 591 (emphasis added).

<sup>39</sup> See Minn. Stat. § 645.16 (2016) ("Every law shall be construed, if possible, to give effect to all its provisions"); see also *Owens v. Federated Mut. Implement and Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983) (stating that "no word, phrase or sentence should be deemed superfluous, void or insignificant.").

<sup>40</sup> *Matter of Ryan*, 303 N.W.2d 462, 466 (Minn. 1981).

or synonymous words, or they may run afoul of section 211B.02's requirements.<sup>41</sup> The Minnesota Court of Appeals has also addressed the requirement for clarity, stating that "[a] person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party."<sup>42</sup> The requirement that candidates use specific language is consistent with the Fair Campaign Practices Act's purpose "to promote informed voting so essential in a free society,"<sup>43</sup> and to prevent "false political speech [which] can be electorally toxic . . . and have serious adverse consequences for the public at large."<sup>44</sup>

The Minnesota Supreme Court has indicated that whether a person has the endorsement or support of a political party is a matter that can be objectively determined.<sup>45</sup> Respondent acknowledges that she did not have the endorsement of the RPM in 2016. She also did not have the "endorsement" of the judicial election committee. The judicial election committee did not have the authority to confer an endorsement upon a candidate. Pursuant to the RPM constitution in effect at the time of the 2016 state convention, the judicial election committee could only recommend to the party delegates that a candidate be endorsed. Following the committee's recommendation, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, they would then vote on the endorsement of specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.

Respondent underwent the RPM's endorsement process in 2014. She was aware that the judicial election committee could recommend her for endorsement, but that an endorsement required action by the delegates of the RPM according to the party's official process. Respondent knew she had not been "endorsed" by the judicial election committee. Therefore, the Panel finds that Respondent's claim of endorsement by the "GOP Judicial Selection Committee 2016" was knowingly false and violated Minn. Stat. § 211B.02. Respondent could have truthfully stated in her candidate profile that a majority of the RPM's judicial election committee supported her candidacy. Instead, her statement that the committee endorsed her, when it had no authority to "endorse," was a false claim of endorsement that Respondent knew to be false.

Having found Respondent falsely claimed she was endorsed by the GOP Judicial Selection Committee, the Panel need not decide whether her claim also falsely implied endorsement by the RPM.

<sup>41</sup> *Id.*

<sup>42</sup> *Niska*, 2014 WL 902680 at \*6.

<sup>43</sup> *Daugherty v. Hilary*, 344 N.W.2d 826, 832 (Minn. 1984).

<sup>44</sup> *Niska*, 2014 WL 902680 at \*7.

<sup>45</sup> *Schmitt*, 275 N.W.2d at 591.

The Panel concludes that Respondent's violation of section 211B.02 was ill-considered and that a civil penalty in the amount of \$500 is appropriate.<sup>46</sup>

**J. P. D., J. M. C., J. E. L.**

<sup>46</sup> See Penalty Matrix (<http://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>); *Fine v. Bernstein*, 726 N.W.2d 137, 149-50 (Minn. Ct. App.), *review denied* (Minn. 2007).

OAH Docket Number: 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

v.

Michelle MacDonald,

Respondent.

**NOTICE OF APPEARANCE**

**RECEIVED**

By: OAH on 12/29/2016 at 2:33 PM

**PLEASE TAKE NOTICE that:**

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.
2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**
3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

**Respondent:**

Michelle L. MacDonald  
MacDonald Law Firm  
1069 South Robert Street, Suite U  
West Saint Paul, MN 55118  
(651) 222-4400  
michelle@macdonaldlawfirm.com

**Respondent's Attorney:**

Erick G. Kaardal  
Mohrman, Kaardal & Erickson, P.A.  
150 South Fifth Street, Suite 3100  
Minneapolis, MN 55402  
(612) 341-1074  
kaardal@mklaw.com

**Complainants:**

Steven J. Timmer  
5348 Oaklawn Avenue  
Edina, MN 55424  
(952) 607-7734  
stimmer@planetlawyers.com

Barbara J. Linert  
4282 Braddock TL  
Eagan, MN 55123

Dated: December 29, 2016

/s/Erick G. Kaardal  
**Signature of Party/Agency or Attorney**

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of

OAH Docket No. 71-0320-33929

Barbara Linert and Steven Timmer,

Complainants,

**AFFIDAVIT OF SERVICE**

v.

Michelle MacDonald,

**Respondent.**

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STATE OF MINNESOTA      )  
                                  ) ss.  
COUNTY OF HENNEPIN    )

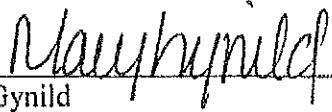
Mary Gynild, of the City of Minneapolis, County of Hennepin, State of Minnesota, being affirmed on oath, says that on the 29<sup>th</sup> day of December, 2016 she served the following:

1. Notice of Appearance;

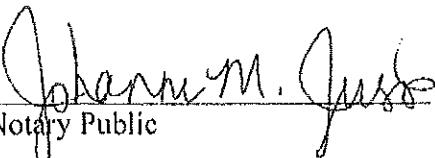
on the following parties in this action, through their respective attorneys, by U.S. Mail, a true and correct copy thereof, enclosed in an envelope postage pre-paid, and directed to the following at their last known address:

Steven J. Timmer  
5348 Oaklawn Avenue  
Edina, MN 55424

Barbara J. Linert  
4282 Braddock TL  
Eagan, MN 55123

  
Mary Gynild

Subscribed and affirmed to before me  
this 29<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
Notary Public



**McCausland, Kendra (OAH)**

---

**From:** Debbie Sampson <debbie@macdonaldlawfirm.com>  
**Sent:** Thursday, January 19, 2017 1:23 PM  
**To:** Cary, LeeAnn (OAH)  
**Cc:** Debbie Sampson  
**Subject:** RE: Estimate of Appeal Transcripts

Hi LeeAnn,

Michelle does want both hearings for the appeal. I will assume we need the O+3 since there were two complainants in the matter. Can you let me know where the check goes, my account will be in this weekend and I will have her cut the checks. Also to whom they need to be made out.

Thanks

Very Truly Yours

MacDonald Law Firm, LLC

**Debbie Sampson**

ParaLegal

**Mailing & Delivery:**

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**From:** Cary, LeeAnn (OAH) [mailto:[leeann.cary@state.mn.us](mailto:leeann.cary@state.mn.us)]  
**Sent:** Thursday, January 19, 2017 11:13 AM

**To:** Debbie Sampson  
**Subject:** Estimate of Appeal Transcripts

Hello –

Below is the estimate for the costs of the transcripts. The O+2 is the original plus two copies – one for the court, one for the appealing party and one for the other side. The O+3 is adding one more as it appears there were two complainants in this matter.

Once I receive confirmation of what dates you would like transcribed, I will inform the court reporter to begin and they will prepare a Certificate of Transcript. If you happen to know the COA file number, that would be great.

Thanks!

**LeeAnn M. Cary**

Scheduling Supervisor

**Office of Administrative Hearings**

600 Robert St N

PO Box 64620

St. Paul, MN 55164-0620

P: 651-361-7832

F: 651-539-0310

[mn.gov/oah](http://mn.gov/oah)

 **MINNESOTA**

**From:** Kirby Kennedy [mailto:[kirbykennedy@kkreporters.com](mailto:kirbykennedy@kkreporters.com)]

**Sent:** Thursday, January 19, 2017 11:08 AM

**To:** Cary, LeeAnn (OAH) <[leeann.cary@state.mn.us](mailto:leeann.cary@state.mn.us)>

**Subject:** Re: Estimate

Hi LeeAnn,

Here's the estimates for the hearings. If they decide to appeal we will forward the tapes to the reporter at that time.

November 1 hearing:

If it's an O+2 the cost will be \$450.00

If it's an O+3 the cost will be \$600.00

December 21 hearing:

If it's an O+2 the cost will be \$1,100.00

If it's an O+3 the cost will be \$1,500.00

Let me know if you have any other questions.

Thank you,

KIRBY KENNEDY & ASSOCIATES

7044 East Fish Lake Road

Maple Grove, Minnesota 55311

952-922-1955

**From:** Cary, LeeAnn (OAH)

**Sent:** Thursday, January 19, 2017 10:05 AM

**To:** Kirby Kennedy

**Subject:** Estimate

Good morning –

I will be sending two audio recordings that I will need an estimate on. The requesting party will be filing an APA appeal so I believe they are responsible for copies of the transcript to the other party also.

ShareFile Attachments	Expires February 19, 2017
oah_0320-33929_20161101_132333.dcr	63.3 MB
<a href="#">Download Attachments</a>	

LeeAnn Cary uses ShareFile to share documents securely. [Learn More.](#)

Please call me if you have any questions.

Thanks!

**LeeAnn M. Cary**  
Scheduling Supervisor

**Office of Administrative Hearings**

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OAH 71-0320-33929

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

Michelle MacDonald,

Respondent.

The above-entitled matter brought under the Fair Campaign Practices Act came on for an evidentiary hearing on December 21, 2016, before the following panel of Administrative Law Judges: Jessica A. Palmer-Denig (Presiding Judge), Jeanne M. Cochran, and James E. LaFave (the Panel). The record closed at the conclusion of the hearing on December 21, 2016.

Barbara Linert and Steven Timmer (Complainants) appeared on their own behalf and without legal counsel. Erick Kaardal, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Michelle MacDonald (Respondent).

**STATEMENT OF THE ISSUES**

1. Did Complainants demonstrate by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 (2016) by stating that she had the endorsement of the “GOP’s Judicial Selection Committee 2016?”

2. If so, what penalty is appropriate?

**SUMMARY OF CONCLUSIONS**

Complainants established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by claiming she was endorsed by the “GOP’s Judicial Selection Committee 2016.” For this violation, the Panel concludes a \$500 civil penalty is appropriate.

Based on the record and proceedings herein, the undersigned Panel of Administrative Law Judges makes the following:

## FINDINGS OF FACT

1. Respondent was a candidate for the Minnesota Supreme Court in the November 8, 2016, general election.

2. Respondent was invited by the Republican Party of Minnesota's (RPM) judicial election committee to seek the party's endorsement prior to the RPM's state convention.<sup>1</sup> The RPM's state convention was held in Duluth, Minnesota on May 20-21, 2016.

3. The RPM's judicial election committee was a 22-member state convention committee consisting of two members from each of the state's ten Judicial Districts, appointed by their respective Judicial District chairs, and two members appointed by the chair of the RPM.<sup>2</sup>

4. RPM state convention committees are created to assist with carrying out the work of the RPM state convention.<sup>3</sup> These committees are temporary, convention-specific committees.<sup>4</sup> In addition to the judicial election committee, the RPM has the following other state convention committees: a platform committee, rules committee, credentials committee and nominating committee.<sup>5</sup>

5. The RPM's judicial election committee does not have the authority to confer an endorsement.<sup>6</sup> It may only recommend to the state convention delegates that a particular candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals be endorsed by the RPM.<sup>7</sup>

6. Respondent had been endorsed by the RPM two years earlier, in 2014, when she ran unsuccessfully as a candidate for the Minnesota Supreme Court.<sup>8</sup>

7. Approximately one week before the RPM's 2016 state convention, Respondent met with and was interviewed by the RPM's judicial election committee. No other judicial candidate was interviewed.<sup>9</sup> Following that meeting, the judicial election committee voted 20 to 2 in favor of recommending to the party delegates that Respondent be endorsed by the RPM.<sup>10</sup> The two committee members who voted against recommending endorsement for Respondent were Harry Niska and David Asp.<sup>11</sup> Both

---

<sup>1</sup> Testimony (Test.) of Michelle MacDonald.

<sup>2</sup> Test. of Timothy Kinley; Exhibit (Ex.) 2 at 9 (Art. VI, § 2) and 11 (Art. VI, § 6).

<sup>3</sup> Ex. 2 at 9 (Art. VI, § 2).

<sup>4</sup> Test. of T. Kinley.

<sup>5</sup> Ex. 2 at 9 (Art. VI, § 2).

<sup>6</sup> Test. of Harry Niska and Barbara Linert.

<sup>7</sup> Test. of H. Niska, B. Linert and T. Kinley.

<sup>8</sup> Test. of H. Niska.

<sup>9</sup> *Id.*

<sup>10</sup> Test. of H. Niska and M. MacDonald.

<sup>11</sup> *Id.*

Messrs. Niska and Asp were appointed to the committee by Keith Downey, chair of the RPM.<sup>12</sup>

8. The RPM's constitution in effect at the time of the RPM's 2016 state convention provided that, following the report of the RPM's judicial election committee, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, the delegates would then vote on whether to confer endorsement on specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.<sup>13</sup>

9. At the RPM's state convention in 2016, Diane Anderson, the chair of the judicial election committee, offered the committee's majority report recommending that Respondent be endorsed by the RPM.<sup>14</sup>

10. Following the presentation of the judicial election committee's majority report, Mr. Niska offered a minority report recommending against endorsing Respondent.<sup>15</sup>

11. Ultimately the delegates voted against endorsing any candidates for the Minnesota Supreme Court or Minnesota Court of Appeals.<sup>16</sup> As a result, Respondent was not endorsed by the RPM.

12. Following the 2016 state convention, the RPM amended its constitution to eliminate the judicial election committee.<sup>17</sup> Judicial endorsements are now considered by the RPM's nominations committee.<sup>18</sup>

13. Sometime prior to October 18, 2016, Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was posted in a "Voter Guide" section on the newspaper's website.<sup>19</sup> In the "Endorsements" section of her candidate profile, Respondent claimed she was endorsed by:

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016.<sup>20</sup>

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<sup>12</sup> Test. of M. MacDonald.

<sup>13</sup> Test. of H. Niska; Ex. 2 at 4 (Art. V, § 3C) and 11 (Art. VI, § 6C).

<sup>14</sup> Test. of H. Niska, M. MacDonald and T. Kinley.

<sup>15</sup> Test. of H. Niska and M. MacDonald; Ex. 4.

<sup>16</sup> Test. of H. Niska.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 3 at 4 (Art. V, § 3C) and 9 (Art. VI, § 3).

<sup>19</sup> Test. of M. MacDonald; Ex. 1.

<sup>20</sup> Ex. 1.

14. The RPM does not have a "judicial selection committee."<sup>21</sup>

15. Respondent's candidate profile with the listed endorsements was initially posted on the *Star Tribune* website on or about October 18, 2016.<sup>22</sup>

16. On or about October 21, 2016, Respondent became aware of comments on a social media site that criticized her claim of endorsement by the "GOP's Judicial Selection Committee 2016."<sup>23</sup>

17. On October 21, 2016, Respondent went to the offices of the *Star Tribune* and requested that her claim of endorsement by the GOP Judicial Selection Committee be removed from her candidate profile.<sup>24</sup> The claimed endorsement was removed from Respondent's candidate profile posted on the *Star Tribune* on-line Voter Guide or about October 21, 2016.<sup>25</sup>

18. On October 25, 2016, Complainants filed their complaint under the Fair Campaign Practices Act with the Office of Administrative Hearings.

19. By Order dated October 27, 2016, the Presiding Administrative Law Judge found the complaint alleged a *prima facie* violation of Minn. Stat. § 211B.02, and set this matter on for a probable cause hearing.

20. By Order dated November 3, 2016, the Presiding Administrative Law Judge found probable cause to believe Respondent violated Minn. Stat. § 211B.02.

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2016).

2. Minnesota Statutes, section 211B.02 provides as follows:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

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<sup>21</sup> Test. of Steven Timmer and B. Linert.

<sup>22</sup> Test. of M. MacDonald.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Test. of S. Timmer.

3. The Complainants bear the burden of proving the allegations in the complaint. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.

4. Complainants have established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by falsely claiming to be endorsed by the "GOP's Judicial Selection Committee 2016."

5. Based on the above violation, it is appropriate to impose a civil penalty in the amount of \$500.

6. The attached Memorandum explains the reasons for these Conclusions of Law and is incorporated by reference.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

**ORDER**

Having been found to have violated Minn. Stat. § 211B.02, Respondent shall pay a civil penalty of \$500 by March 31, 2017.<sup>26</sup>

Dated: December 27, 2016



JESSICA A. PALMER-DENIG  
Presiding Administrative Law Judge



JEANNE M. COCHRAN  
Administrative Law Judge



JAMES E. LAFFERTY  
Administrative Law Judge

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<sup>26</sup> The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, PO Box 64620, St. Paul MN 55164-0620.

## NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2016), this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2016).

## MEMORANDUM

Minnesota Statutes, section 211B.02 provides that a candidate may not knowingly make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of “a major political party or party unit or of an organization.”

Complainants maintain that Respondent’s claim of an endorsement by the “GOP’s Judicial Selection Committee 2016” was false and that it falsely implied endorsement of the RPM. Complainants point out that the RPM does not have a “Judicial Selection Committee.” It did have a “judicial election committee” under its then-operative constitution,<sup>27</sup> but this committee had no power to endorse candidates on its own.<sup>28</sup> It only had the authority to recommend candidates for party endorsement.<sup>29</sup> Complainants assert that the word “endorsement” has a specific meaning and requires specific procedures, including a vote in favor of endorsing a candidate by a majority of the delegates at the RPM convention.<sup>30</sup>

Respondent asserts that the Office of Administrative Hearings lacks jurisdiction to consider the complaint because the RPM’s judicial election committee is not a “major political party, party unit or [] organization.” Therefore, Respondent contends that statements concerning the committee’s support or endorsement of her candidacy does not come within the purview of section 211B.02 and cannot form the basis of a violation. Respondent argues the complaint must be dismissed.

The term “organization” is a “simple word with a common usage,”<sup>31</sup> and has been defined in case law as “two or more persons having a joint or common interest.”<sup>32</sup> In *Niska v. Clayton*,<sup>33</sup> the Minnesota Court of Appeals held that section 211B.02 has “broad express reach to protect entities and even individuals from being falsely dubbed as supporters of any candidate.” The Panel concludes that this definition is broad enough

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<sup>27</sup> Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>28</sup> Test. of H. Niska and B. Linert.

<sup>29</sup> *Id.*; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>30</sup> Test. of H. Niska and B. Linert; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

<sup>31</sup> *Niska v. Clayton*, 2014 WL 902680 at \*9 (Minn. Ct. App. 2014), review denied (Minn. June 25, 2014) (identifying, in a hypothetical, the International Falls Chamber of Commerce as an “organization.”).

<sup>32</sup> See *Snider v. State, Dept. of Transp.*, 445 N.W.2d 578, 581 (Minn. Ct. App. 1989) (citing *Black’s Law Dictionary* (5th ed. 1979)).

<sup>33</sup> *Niska*, 2014 WL 902680 at \*9.

to include the RPM's judicial election committee for purposes of section 211B.02.<sup>34</sup> Respondent's motion to dismiss for lack of jurisdiction is denied.

Respondent also argues that she did not imply that she was endorsed by the RPM in 2016. Instead, she maintains she accurately stated in her *Star Tribune* candidate profile that she was endorsed by the RPM in 2014 and by the GOP's Judicial Selection [sic] Committee in 2016. She insists that her use of the term "selection" instead of "election" was simply a typographical error and not an attempt on her part to indicate she was somehow "selected" by the RPM committee. Respondent contends further that because a majority of the judicial election committee did recommend that she be endorsed by the RPM, she could properly characterize the committee as having "endorsed" her. Respondent also notes that the RPM constitution recognizes that party units representing less than the entire electorate for a particular office may endorse a candidate for public office as an expression of sentiment.<sup>35</sup>

Section 211B.02 provides that a person may not knowingly make a false claim stating or implying that a candidate has the "support or endorsement of a major political party or party unit or of an organization."<sup>36</sup> The Panel concludes that, in the context of section 211B.02, endorsement has a specific meaning requiring more than mere support. By its terms, the statute expressly differentiates between "support" and "endorsement." In interpreting this language, the Minnesota Supreme Court has recognized a distinction between the two words. In *Schmitt v. McLaughlin*, a candidate who was not endorsed by the DFL party used the initials "DFL" on advertisements and lawn signs.<sup>37</sup> The Court concluded that the "use of the initials 'DFL' would imply to the average voter that [the candidate] *had the endorsement or, at the very least, the support of the DFL party.*"<sup>38</sup> Interpreting the words "support" and "endorsement" to have different meanings is also consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.<sup>39</sup> Therefore, the Panel rejects Respondent's argument that the recommendation or support of the judicial election committee constituted an "endorsement."

Candidates are required to use language that specifically and accurately describes the affiliation between themselves and any entities listed in campaign material. For example, candidates may inform voters that they have a connection with a political party by using the terms "member of" or "affiliated with" when the candidate is not endorsed by that party.<sup>40</sup> However, candidates have been cautioned that they must use those words,

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<sup>34</sup> See *City of Grant v. John and Karen Smith*, No. 8-0325-33077, NOTICE OF PRIMA FACIE DETERMINATION AND PREHEARING CONFERENCE at 4 (Minn. Office Admin. Hearings, Dec. 21, 2015) (concluding that a municipality may be considered an "organization" for purposes of section 211B.02).

<sup>35</sup> See Ex. 2 at 4 (Art. V, § 3(A)(6)).

<sup>36</sup> Minn. Stat. § 211B.02.

<sup>37</sup> 275 N.W.2d 587 (Minn. 1979).

<sup>38</sup> *Id.* at 591 (emphasis added).

<sup>39</sup> See Minn. Stat. § 645.16 (2016) ("Every law shall be construed, if possible, to give effect to all its provisions"); see also *Owens v. Federated Mut. Implement and Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983) (stating that "no word, phrase or sentence should be deemed superfluous, void or insignificant").

<sup>40</sup> *Matter of Ryan*, 303 N.W.2d 462, 466 (Minn. 1981).

or synonymous words, or they may run afoul of section 211B.02's requirements.<sup>41</sup> The Minnesota Court of Appeals has also addressed the requirement for clarity, stating that "[a] person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party."<sup>42</sup> The requirement that candidates use specific language is consistent with the Fair Campaign Practices Act's purpose "to promote informed voting so essential in a free society,"<sup>43</sup> and to prevent "false political speech [which] can be electorally toxic . . . and have serious adverse consequences for the public at large."<sup>44</sup>

The Minnesota Supreme Court has indicated that whether a person has the endorsement or support of a political party is a matter that can be objectively determined.<sup>45</sup> Respondent acknowledges that she did not have the endorsement of the RPM in 2016. She also did not have the "endorsement" of the judicial election committee. The judicial election committee did not have the authority to confer an endorsement upon a candidate. Pursuant to the RPM constitution in effect at the time of the 2016 state convention, the judicial election committee could only recommend to the party delegates that a candidate be endorsed. Following the committee's recommendation, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, they would then vote on the endorsement of specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.

Respondent underwent the RPM's endorsement process in 2014. She was aware that the judicial election committee could recommend her for endorsement, but that an endorsement required action by the delegates of the RPM according to the party's official process. Respondent knew she had not been "endorsed" by the judicial election committee. Therefore, the Panel finds that Respondent's claim of endorsement by the "GOP Judicial Selection Committee 2016" was knowingly false and violated Minn. Stat. § 211B.02. Respondent could have truthfully stated in her candidate profile that a majority of the RPM's judicial election committee supported her candidacy. Instead, her statement that the committee endorsed her, when it had no authority to "endorse," was a false claim of endorsement that Respondent knew to be false.

Having found Respondent falsely claimed she was endorsed by the GOP Judicial Selection Committee, the Panel need not decide whether her claim also falsely implied endorsement by the RPM.

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<sup>41</sup> *Id.*

<sup>42</sup> *Niska*, 2014 WL 902680 at \*6.

<sup>43</sup> *Daugherty v. Hilary*, 344 N.W.2d 826, 832 (Minn. 1984).

<sup>44</sup> *Niska*, 2014 WL 902680 at \*7.

<sup>45</sup> *Schmitt*, 275 N.W.2d at 591.

The Panel concludes that Respondent's violation of section 211B.02 was ill-considered and that a civil penalty in the amount of \$500 is appropriate.<sup>46</sup>

**J. P. D., J. M. C., J. E. L.**

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<sup>46</sup> See Penalty Matrix (<http://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>); *Fine v. Bernstein*, 726 N.W.2d 137, 149-50 (Minn. Ct. App.), review denied (Minn. 2007).

2017 WL 2979580 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

Barbara LINERT, Respondent,  
Steven TIMMER, Respondent,  
v.

Michelle MACDONALD, Relator.,  
MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS, Respondent.

No. A17-0127.  
March 30, 2017.

### **Relator's Principal Brief**

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### **\*1 ISSUES PRESENTED**

I. The Appellant, Michelle MacDonald, as a candidate, provided to a newspaper information for an unofficial voter's guide that included a listing of "endorsements." MacDonald was prosecuted under [Minnesota Statute § 211B.02](#) for listing a "GOP judicial selection committee" as having "endorsed" her candidacy, the majority of which did support her, although the Republican Party did not complete an endorsement process for judicial candidates it started.

Whether Minnesota Statute § 21113.02, banning implicit or indirect false claims of political support of a political party is unconstitutionally overbroad because it chills truthful speech regarding unofficial endorsements of members of a political party.

- Issue raised in district court proceedings; OAH proceedings; Hearing on underlying complaint.
- District court ruling: The OAH ruled the Appellant violated Minnesota Statute § 21113.02 as having made false claims of endorsement.
- *Apposite constitutional, statute, or case law:* [U.S. Const. amend. I](#); [Minn. Stat. § 211B.02](#); [State v. Machbolz](#) 574 N.W.2d 415, 419 (Minn. 1998);

### **\*2 II. Minnesota Statute § 211B.01, subd. 2** defines "campaign material" as

Any literature, publication, or material that is disseminated for the "purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.

Whether the Office of Administrative Hearings had jurisdiction to hear the underlying complaint when the newspaper publication of a "Voters Guide" is the compilation of information compiled and published by the newspaper, not paid for, created by, or disseminated by the candidate as "campaign material" as defined under [Minnesota Statute § 211B.01, subd. 2](#) of Minnesota Campaign Fair Practices Act.

- *Issue raised in district court proceedings:* OAH proceedings; Hearing on underlying complaint.
- *District court ruling:* jurisdiction cannot be waived. The OAH asserted that it had jurisdiction, but on issue relating to the term "organization."
- *Apposite constitutional, statute, or case law:* [Minn. Stat. § 211B.02](#); [In re Hibbing Taconite Mine and Stockpile Progression](#), 888 N.W.2d 336 (Minn. App. 2016)

### **\*3 STATEMENT OF THE CASE AND FACTS**

The Respondents Barbara Linert and Steve Timmer, asserted that the Appellant Michelle MacDonald, as a judicial candidate, had published through the Star Tribune's "Voter Guide" section of its newspaper, a false claim of endorsement as part of her campaign profile under [Minnesota Statute § 211B.02](#).<sup>1</sup> Linert and Timmer filed a complaint with the

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Minnesota Office of Administrative hearings asserting that MacDonald's listing under a heading "endorsements" with the phrase, "GOP's Judicial Selection Committee 2016" violated Minnesota's campaign laws.<sup>2</sup> The phrase appeared on the Star Tribune newspaper's website on October 18, 2016.<sup>3</sup> The statute at issue, Minnesota Statute § 21113.02 states that a person or candidate may not, directly or indirectly, falsely claim he or she has the support or endorsement of a major political party, party unit, or organization.<sup>4</sup>

When MacDonald became aware of others concern about the statement, she had it immediately removed from the website three days later on October 21st.<sup>5</sup> In their OAH complaint Linert and Timmer asserted that MacDonald falsely implied to be endorsed by Republican Party of Minnesota.<sup>6</sup>

A hearing on the matter was conducted. Ultimately, the OAH Tribunal found that MacDonald violated § 211B.02 and fined MacDonald \$500 as a penalty.<sup>7</sup>

\***4** The Republican Party of Minnesota did not have a "judicial selection committee," but did have a "judicial election committee."<sup>8</sup> Notably, the Republican Party's constitution recognizes that party units representing less than the entire electorate for a particular office may endorse a candidate for public office as an expression of sentiment.<sup>9</sup> These sub-unit endorsements are unofficial endorsement which do not carry commitments of financial resources and do not restrict other sub-units to endorse anyone else.<sup>10</sup>

Regardless, over 90% of the judicial election committee members - 20 to 2 - did recommend that MacDonald be endorsed by the Republican Party. The Republican Party on the other hand, decided not to endorse - as a state party - any judicial candidate for the Minnesota Supreme Court or the Court of Appeals. Notably, after the state convention the Republican Party eliminated from its constitution the judicial election committee and judicial endorsements were instead sent to the Party's nominating committee.<sup>11</sup>

One of MacDonald's contentions was that she accurately stated she was endorsed by the Republican Party in 2014 and by the GOP's Judicial Selection (sic) Committee in 2016. The 20 to 2 vote of Committee members, MacDonald contended, was an accurate reflection of the Committee's vote even if the Republican Party did not, as a party, endorse her.<sup>12</sup> From her point of view, it was an unofficial sub-party endorsement.<sup>13</sup>

\***5** In addition, it was the Star Tribune newspaper that published the unofficial voter's guide.<sup>14</sup> Nothing in the record revealed that MacDonald caused the Stat Tribune to publish the voter's guide.<sup>15</sup> Nothing in the record reveals that she paid for her profile to be published. Since there is no definition that a voter's guide is campaign material and as such fell under the category of "news item," for which MacDonald was prosecuted for.<sup>16</sup>

The OAH Tribunal determined that candidates are required, under [Minnesota Statute § 211B.02](#), to use language that specifically and accurately describes the affiliation between themselves and any entities listed in campaign material.<sup>17</sup> Quoting [Niska v. Clayton, 2014 WL 902680 at \\*6 \(Minn. App. 2014\)](#), “a person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party.”<sup>18</sup> The OAH went on to state that candidates are required to use specific language “to promote informed voting so essential in a free society,” [Daugherty v. Hilary, 344 N.W.2d 826, 832 \(Minn. 1984\)](#) to prevent ““false political speech” that could have ““serious adverse consequences for the public at large.””<sup>19</sup>

Notably, between the intervening time of the decision the OAH relied upon in [Niska v. Clayton, 2014 WL 902680 at \\*6 \(Minn. App. 2014\)](#), decided in March of 2014, an Eighth Circuit Court of Appeals decision in the matter [281 Care Committee v. Arneson, 766 F.3d 774 \(8th Cir. 2014\)](#), decided in September, that determined a similar statute, [\\*6 Minnesota Statute § 211B.06](#), was violative of the First Amendment. Applying a strict scrutiny analysis, the Eighth Circuit ruled that the statute was not narrowly tailored to meet any compelling government interest Minnesota had in preserving the integrity and reliability of the election contest.

In addition, during the drafting of the instant appellant brief, an unpublished decision in [City of Grant by and through Points v. Smith, A16-1070, 2017 WL 957717 \(Minn. App. Mar. 13, 2017\)](#) was decided concerning the very statute at issue here, [Minnesota Statute § 211B.02](#). However, the appellate court in City of Grant appeared to have ignored the evolved legal analysis of the intervening cases mentioned above. The same analysis found under 281 Care Committee v. Arneson, for instance, should apply here. In short, a constitutional overbreadth analysis should be applied to [Minnesota Statute § 211B.02](#) and found void as unconstitutionally overbroad.

#### **RELIEF REQUESTED**

The Appellant Michelle MacDonald seeks the reversal of the Minnesota Office of Administrative Hearings decision prosecuting her for violating [Minnesota Statute § 211B.02](#).

#### **\*7 STANDARDS OF REVIEW**

##### **I. On matters of subject matter jurisdiction and statutory interpretation, the appellate court review is de novo.**

Subject matter jurisdiction is a question of law, which this court reviews de novo.<sup>20</sup> Likewise, on issues of statutory interpretation and constitutional interpretation the appellate court's review is de novo.<sup>21</sup>

##### **II. The appellate court is not entirely bound by decisions of the Office of Administrative Hearings.**

On writ of certiorari, this Court will determine whether the agency violated the constitution, exceeded its authority, engaged in unlawful procedure, erred as a matter of law, issued a decision unsupported by substantial evidence, or acted arbitrarily or capriciously.<sup>22</sup> Thus, the reviewing court defers to the agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable.<sup>23</sup> When reviewing questions of law, however, this Court is not bound by the agency's decision and need not defer to the agency's expertise.<sup>24</sup>

## \*8 LEGAL ARGUMENT AND AUTHORITIES

### INTRODUCTION

There is no evidence in the Office of Administrative Hearings record to support any causal link between the use of the word “endorsement” as another means of expressing “support” for a person’s candidacy to the preservation of integrity of the electoral process as a stated governmental interest. Moreover, the Appellant Michelle MacDonald was prosecuted for making exaggerated statements of endorsement, which is another word for support. She was supported by a majority of members of a judicial selection committee of the Republican Party. However, the Party never formally processed the support in an endorsement process. Nevertheless, because the meaning of endorse also includes support, the use of the statement is no more than an exaggeration of a true statement.

Nevertheless, the application of Minnesota’s campaign statute under § 211B.02, as applied to MacDonald is unconstitutional. It is violative of the First Amendment because it punishes her for using exaggerated statements of truth.

Moreover, MacDonald did not publish the alleged false statement. A local newspaper, the Star Tribune, gathered information from candidates as profiles, and then disseminated the information under an unofficial voter guide. Nothing in the record reflects the notion that MacDonald caused the newspaper to publish the listing of MacDonald’s support. In other words, MacDonald was prosecuted for a statement published over which she had no control to prosecute as if the voter’s guide was campaign material, but which could only be defined as a news item. Hence, the Office of Administrative Hearings should have no \*9 jurisdiction over a complaint under which the publication of a statement is not within the control of the candidate.

#### **I. Minnesota Statute 211B.02 is unconstitutionally overbroad because the statute bans or chills truthful statements of support by members and sub-units of political parties.**

Minnesota Statute 211B.02 is unconstitutionally overbroad because the statute bans or chills truthful statements of support by members and sub-units of political parties. The statute is not narrowly tailored to preserve truthful political speech from prosecution as this case shows.

The First Amendment of the United States Constitution states: “Congress shall make no law... abridging the freedom of speech.”<sup>25</sup> the regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment.<sup>26</sup> “Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people.”<sup>27</sup> It is, particularly, at the heart of the protections of the First Amendment,<sup>28</sup> and is, “of course,... at the core of what the First Amendment is designed to protect.”<sup>29</sup> “Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it.”<sup>30</sup>

\*10 “A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights.”<sup>31</sup> With respect to limitations on speech, a statute is overbroad “if a substantial amount of protected speech is prohibited or chilled in the process of banning unprotected speech.”<sup>32</sup> The overbreadth must be substantial in relation to a statute’s plainly legitimate sweep.<sup>33</sup> Applying the overbreadth doctrine to invalidate a statute, however, is a “strong medicine” that should be “used sparingly and only as a last resort.”<sup>34</sup>

The object of statutory interpretation “is to ascertain and effectuate the intention of the legislature.”<sup>35</sup> When interpreting a law, Minnesota courts will “first assess[] whether the [ordinance’s] language, on its face, is clear or ambiguous.”<sup>36</sup> The court will “construe words and phrases according to their plain and ordinary meaning.”<sup>37</sup> A law is read as a whole,

and each section is interpreted “in light of the surrounding sections to avoid conflicting interpretations.”<sup>38</sup> Whenever possible, “[e]very law shall be construed ... to give effect to all its provisions.”<sup>39</sup>

\*11 When interpreting a statute, a court must first determine whether the statute's language, on its face, is ambiguous.<sup>40</sup> “A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” Id. Words and phrases are to be construed according to their plain and ordinary meaning.<sup>41</sup> Where the legislature's intent is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning.<sup>42</sup>

Under the circumstances of the instant appeal, MacDonald was prosecuted under [Minnesota Statute § 211B.02](#), for making statements to the press in which her listing under the category of “endorsements” was published by the Star Tribune newspaper as a news item under its’ unofficial voter guide.<sup>43</sup> The statute at issue asserts that a candidate may be prosecuted for making false claims of support or endorsement - implicitly or indirectly - by a major political party, party unit, or organization:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate ... has the support or endorsement of a major political party or party unit or an organization.<sup>44</sup>

The Office of Administrative Hearings decision asserted that the words “support” and “endorsement” have different meanings; however, the OAH failed to define both and further asserted “that if MacDonald had stated “that a majority of the RPM's judicial election \*12 committee supported her candidacy” there would be no supportable claim against her under [Minnesota Statute § 211B.02](#).<sup>45</sup> However, the OAH's discussion is out of context.

Under the Republican Party of Minnesota's Constitution, there is no definition of “endorsement.” Its constitution describes both an official endorsement process for the state GOP party as a whole and a sub-units process to informally endorse with no financial commitments and without restricting other sub-units from endorsing anyone else.

Likewise, there is no statutory definition of “support” or “endorsement” under [Minnesota Statute § 211B.02](#). The words “endorsement” and “support” can be used interchangeably since the statute is inclusive of types of entities the statute is to be applied to: a political party, political unit, or organization. Thus, it cannot be presumed, as the OAH has here, that “support” cannot mean “endorsement” and “endorsement” cannot mean “support.” It is a fact that the majority of the judicial election committee supported MacDonald for the Republican Party's endorsement process. But “endorsement” does mean “support”:

endorsement: 1. an act of giving one's public approval or support to someone or something.<sup>46</sup>

[Minnesota Statute § 211B.02](#) does not state a person must use the word “endorsement” only if a party or organization has completed an official endorsement process or that a person cannot use the work “support” if a party or organization has an official sub-unit endorsement process. The OAH's statutory interpretation reflects that the statute is unconstitutionally overbroad and stifles, chills and deters a candidate's truthful \*13 political speech. Basically, a candidate can not truthfully report a sub-unit's endorsement without threat of a violation that the statement is false because he state GOP did not endorse.

For example, if the Steele County Republicans gather and endorse MacDonald in a statewide race where the state GOP has not endorsed, the statute prohibits MacDonald from truthfully presenting that endorsement even though the GOP state constitution would allow it as a sub-unit endorsement without financial commitments. The complainants want to

use the statute and its prosecutions to deter such local, sub-unit endorsement meetings to endorse to occur - which is contrary to the First Amendment.

The OAH's effort to distinguish the two words - endorsement and support -- as distinct without giving either definition in context by quoting from *Schmitt v. McLaughlin* is not helpful where a candidate used the initials "DEL" on advertisements and lawn signs, as implying "to the average voter that "the candidate" had the endorsement or, at the very least, the support of the DEL party."<sup>47</sup> For instance, here, there is no evidence that the Christians United in Politics, also listed by MacDonald under "Endorsements," has a formal endorsement process as does the Republican Party. Thus, whether MacDonald used "support" or "endorsed" she would not be incorrect in reporting to the public of the organization's decision about her candidacy or that of the identified Selection Committee.

Hence, [Minnesota Statute § 211B.02](#) is unconstitutionally overbroad.

\***14** The constitutionality of a statute presents a question of law, which this Court reviews de novo.<sup>48</sup> Generally, the burden is on appellant to prove, beyond a reasonable doubt, that a statute is unconstitutional.<sup>49</sup> But, when deciding the constitutionality of a law restricting First Amendment rights, the law "does not bear the usual presumption of constitutionality normally accorded to legislative enactments."<sup>50</sup> Therefore, this Court "proceed's" with the understanding that the state bears the burden of establishing the statute's constitutionality."<sup>51</sup>

This Court recently examined the constitutionality of statute at issue in the unpublished decision in *City of Grant* by and through *Points v. Smith*.<sup>52</sup> We believe the decision failed to correctly examine relevant case law and Grant's conclusion cannot stand under the circumstances of this case as applied to MacDonald under the constitutional overbreadth doctrine.<sup>53</sup>

In *Grant*, this Court did recognize that although [Minnesota Statute § 211B.02](#) is "a content-based restriction only insofar as it regulates speech concerning the identity of the speaker," the speaker's identity is still subject to First Amendment protection.<sup>54</sup> The \***15** appellate court then asserts, relying upon the U.S. Supreme Court case in *McIntyre v. Ohio Elections Comm'n*, for the proposition that "a state has a legitimate 'interest in preventing fraud.'"<sup>55</sup> However, in the recent published decision in *281 Care Comm. v. Arneson*, in examining [Minnesota Statute § 211B.06](#) (and finding it unconstitutional), that to "rely upon *McIntyre* to establish that § 211B.06 is actually necessary and a "direct means" to counter the fraud of voter manipulation, ... takes *McIntyre* too far" and overstates its holding.<sup>56</sup>

In the instant case, MacDonald was subjected to an OAH process that allows any person to commence an action<sup>57</sup> for her use of one word - endorsement - which reflects a true statement of "support" by a majority of a screening committee of a political party, in which the political party, for what ever reason, failed to take the committee's decision and complete a formal party process for the party's full "endorsement." Like the Eighth Circuit Court of Appeals decision in *281 Care Committee* regarding § 211B.06, [Minnesota Statute § 211B.02](#) perpetuates "the very fraud it is allegedly designed to prohibit."<sup>58</sup> The Eighth Circuit was particularly concerned with the OAH process under Minnesota's campaign laws in which the filing of an OAH complaint would be used prudently.<sup>59</sup> Moreover, the court recognized that there was a "real risk of complaints from, for example, political opponents"<sup>60</sup> or a political party. As the facts reveal, it makes political participants who misuse a word "easy targets."<sup>61</sup>

\***16** Nevertheless, in *City of Grant*, the appellate court made no causal link between [Minnesota Statute § 211B.02](#) and preserving the integrity of the electoral process.<sup>62</sup> The court merely stated that the state had a compelling interest, but

merely making the statement does not “satisfy the heavy burden when protected speech is regulated.”<sup>63</sup> It is merely conjecture which is unacceptable:

Certainly, it must be acknowledged that allowing an individual to disseminate political advertising that contains knowing falsehoods does not advance a fair and honest election. Yet merely relying upon common sense do's not satisfy the heavy burden when protected speech is regulated.... We “have never accepted mere conjecture as adequate to carry a First Amendment burden.” *Nixon v. Shrink Mo. Gov't PAC* 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). Appellees defend the statute's ability to dissuade fraud with common sense, but is there such a problem that this infringement on protected speech must occur in the first instance? They argue that the law itself has been construed by Minnesota courts countless times but how often, in practice, is it put to use? Such conjecture about the effects and dangers of false statements equates to implausibility as far as this analysis goes, because, when the statute infringes core political speech, we tend to not take chances.<sup>64</sup>

There is no evidence in the OAH record that MacDonald's use of the word “endorsement” over the phrase “GOP's Judicial Selection Committee” (among other listed organizations) is a causal link to dishonest or unfair elections.

Moreover, the OAH relied upon Schmitt, as did the appellate court in City of Grant, to preclude the constitutional challenge of *Minnesota Statute § 211B.02*. However, First Amendment analysis has evolved since Schmitt. For instance, in 281 Care Committee, the \*17 Eighth Circuit Court of Appeals opined regarding the need for a causal link between the interests of the statute at issue there, § 211.06 is not actually necessary to achieve the stated interests:

The county attorneys have not offered persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the interest advanced in this case. “[W]hen the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.” ... There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal.<sup>65</sup>

Likewise, here, the MacDonald OAH hearing presented no evidence that counterspeech would not suffice to achieve the interests advanced with less restrictive means: “There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal.”<sup>66</sup>

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uniformed, the enlightened; to the straight-out lie, the simple truth.... The first Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.<sup>67</sup>

\*18 MacDonald, under the facts of this case, may have used an exaggeration of speech with the word “endorsement,” but the state may not prevent others from exaggeration.<sup>68</sup> Here, the Republican Party could have countered back and forth with MacDonald as it is the way of the world in election discourse.<sup>69</sup> The evidence here reveals nothing - the Republican Party did nothing to challenge MacDonald's exaggeration, if it can be labeled as such, by her chose of words.

Again, in an overbreadth challenge,<sup>70</sup> the court must determine whether the statute at issue “reaches a substantial amount of constitutionally protected conduct.”<sup>71</sup> As it applies to MacDonald in this case, the statute does. Although the record reflects MacDonald acknowledging no formal endorsement by the state Republican Party of her candidacy,

Barbara LINER, Respondent, Steven HUMMER, ..., 2017 WL 2979540. Minnesota Statute § 211B.02, prevents her from using any speech, any word, directly or indirectly that reflects true events - here, the majority support of a judicial election committee or a future sub-unit endorsement as allowed by the Minnesota GOP constitution. MacDonald would not be able to truthfully represent any sub-unit endorsements nor support because the state GOP did not endorse her. MacDonald for instance, would be subject to the same prosecution under § 211B.02 if she described the events of the judicial election committee unofficially endorsing her in a public bar. Likewise, she would be unable to openly speak at political campaign stops, radio interviews, debates, or at dinner parties \*19 used as fundraisers, or other similar circumstances to express the same events under which she has been prosecuted if she used the word "endorse" instead of "support" or used the word "endorse" in exaggeration.

Therefore, Minnesota Statute § 211B.02 is unconstitutionally overbroad because in its ban of implicit and indirect political party endorsements, the statutes bans too much truthful speech to be constitutional.

**II. The Office of Administrative Hearings did not have subject-matter jurisdiction to hear the underlying complaint when the newspaper publication of an unofficial voters guide is the compilation of information compiled and published by a newspaper which was solely disseminated by the newspaper and not the candidate.**

Subject-matter jurisdiction is a question of law, which this court reviews de novo.<sup>72</sup> Further, "[D]efects in subject matter jurisdiction can be raised at any time and cannot be waived by the parties."<sup>73</sup> Moreover, because an administrative agency's "lack of statutory authority betokens a lack of jurisdiction," an agency decision "rendered either without statutory authority or in excess of the authority granted" is void.<sup>74</sup>

There is no dispute the Minneapolis Star Tribune gathered and published an unofficial voter guide<sup>75</sup> in 2016 for the November election of that same year.<sup>76</sup> There is \*20 nothing in the record that shows the Appellant Michelle MacDonald caused the Star Tribune to publish its voter guide. Certainly, it was the Star Tribune that gathered the information regardless the manner gathered, but it was the newspaper's decision to publish the guide and the guide's content. Moreover, there is no evidence in the record that shows that MacDonald paid the Star Tribune to publish her candidate profile as an ad to promote her candidacy. There is no definition in Minnesota law that a newspaper's publication of an unofficial voter's guide is "campaign material." the is no evidence in the record that reveals an unofficial voter's guide was disseminated by the Star Tribune for the purpose of influencing voting at an election, hence, if falls under the broad category of "news items ... by the news media."<sup>77</sup> By definition, it is an exemption for prosecuting a candidate for making even false statements to the press about his or her candidacy, including misstatements of endorsements once published by the newspaper.

Under the definition of "campaign material," it means "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."<sup>78</sup> The underlying complaint asserts a claim of what was published:

On or before October 19, 2016 Ms. MacDonald caused to be published a candidate profile of herself in a "Voter Guide" section of the website of the Star Tribune newspaper.<sup>79</sup>

MacDonald caused nothing to be published. It was the Star Tribune's decision to publish an unofficial voter's guide. But what was published was a news item, albeit in the \*21 form of an unofficial voter guide, which cannot be defined as "campaign material." Because it was the newspaper that published the alleged false statement of endorsement and not the candidate, the Office of Administrative Hearings did not have jurisdiction to prosecute MacDonald. Therefore, the decision of the OAH should be reversed.

## CONCLUSION

Minnesota Statute § 21113.02 is unconstitutional as applied to the Appellant MacDonald and thus, the OAH prosecution must be reversed.

### Footnotes

- 1 OAH Compl. (Oct. 24, 2016), OAH Rec. Index 1.
- 2 *Id.*
- 3 *Id.*
- 4 [Minn. Stat. § 211B.02](#).
- 5 OAH Findings of Fact, Concl. of Law & Or. at 5 (Dec. 27, 2016). ADD. 5
- 6 OAH Compl. (Oct. 24, 2016), OAH Rec. Index 1.
- 7 OAH Findings of Fact, Concl. of Law & Or. at 4. ADD. 4.
- 8 *Id.*
- 9 *Id.*
- 10 *E.g.*, Complainants' Ex. 1, Item 7.
- 11 *Id.* Ex. 2, Item 7.
- 12 OAH Findings of Fact, Concl. of Law & Or. at 2. ADD. 2.
- 13 Test. of MacDonald, OAH Hring Transc.
- 14 OAH Compl. (Oct. 24, 2016), OAH Rec. Index 1.
- 15 OAH Hring Transcr. (Dec. 21, 2016).
- 16 *Id.*
- 17 OAH Findings of Fact, Concl. of Law & Or. at 8. ADD. 8.
- 18 *Id.*
- 19 *Id.* quoting [Niska, 2014 WL 902680 at \\*7](#).
- 20 [Carlson v. Chermak](#), 639 N.W.2d 886, 889 (Minn. App. 2002) citing [Handicraft Block Ltd. P'ship v. City of Minneapolis](#), 611 N.W.2d 16, 19 (Minn. 2000).
- 21 [City of E. Bethel v. Anoka County Hous and Redevelopment Auth.](#), 798 N.W.2d 375, 379 (Minn. App. 2011) (statutory interpretation); [McCaughtry v. City of Red Wing](#), 831 N.W.2d 518, 521-22 (Minn. 2013) citing [State v. Brooks](#), 604 N.W.2d 345, 348 (Minn. 2000) (constitutional interpretation).
- 22 [Minn. Stat. § 14.62 \(2004\)](#).
- 23 [Reserve Min. Co. v. Herbst](#), 256 N.W.2d 808, 824-26 (Minn. 1977).
- 24 [St. Otto's Home v. Minn. Dep't of Human Servs.](#), 437 N.W.2d 35, 39-40 (Minn. 1989); [No Power Line, Inc. v. Minnesota Envtl. Quality Council](#), 262 N.W.2d 312, 320 (Minn. 1977).
- 25 U.S. Const. amend. I.
- 26 [McIntyre v. Ohio Elections Commn.](#), 514 U.S. 334, 346 (1995).
- 27 [McCutcbeon v. Fed. Election Commn.](#), 134 S. Ct. 1434, 1462 (2014) (Thomas, J. concurring) (internal quotations omitted).
- 28 [281 Care Comm. v. Arneson](#), 638 F.3d 621, 635 (8th Cir. 2011).
- 29 [Morse v. Frederick](#), 551 U.S. 393, 403 (2007) (internal quotation omitted).
- 30 [Republican Party of Minn. v. White](#), 416 F.3d 738, 749 (8th Cir. 2005) (en banc) (White II); see also [McIntyre](#), 514 U.S. at 347.
- 31 [State v. Machholz](#) 574 N.W.2d 415, 419 (Minn. 1998). See [State v. Turner](#), 864 N.W.2d 204 (2015).
- 32 [Ashcroft v. Free Speech Coal](#), 535 U.S. 234, 255 (2002).
- 33 [United States v. Williams](#), 553 U.S. 285, 298 (2008).
- 34 [N.Y. State Club Ass'n, Inc. v. City of New York](#), 487 U.S. 1, 14 (1988).
- 35 [Minn. Stat. § 645.16 \(2010\)](#).
- 36 [In re Khan](#), 804 N.W.2d at 142 quoting [Lase v. 2007 Chevrolet Tahoe](#), 776 N.W.2d 431, 434 (Minn. 2009) (quotation omitted).
- 37 [Am. Family Ins. Grp. v. Schroedl](#), 616 N.W.2d 273, 277 (Minn. 2000).
- 38 *Id.*

39 Minn. Stat. § 645.16.

40 See Amaralv. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn.1999).

41 Frank's Nursery Sales, Inc, v. City of Roseville, 295 N.W.2d 604, 608 Minn. 1980.

42 Ed Herman & Sons v. Russell, 535 N.W.2d 803, 806 (Minn.1995); Minn. Stat. § 645.16 (2000).

43 Id.

44 Minn. Stat. § 211B.02.

45 OAH Findings of Fact, Concl. of Law, and Or. at 8 (Dec. 27, 2016). ADD. 8.

46 New Oxford Dictionary 573 (Angus Stevenson, Christine A. Lindberg eds., 3rd ed., Oxford University Press 2010).

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48 McCaugh v. City of Red Wing, 831 N.W.2d 518, 521-22 (Minn. 2013) citing State v. Brooks, 604 N.W.2d 345, 348 (Minn. 2000); State v. Crawley, 819 N.W.2d 94, 101 (Minn. 2012), cert. denied, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1493, 185 L.Ed.2d 548 (2013).

49 In re Individual 35W Bridge Litig., 806 N.W.2d 820, 829 (Minn. 2011).

50 State by Humphrey v. Casino Mktg. Grp., Inc., 491 N.W.2d 882, 885 (Minn. 1992).

51 Id. at 885-86.

52 *City of Grant by and through Points v. Smith*, A16-1070, 2017 WL 957717, at \*2 (Minn. App. Mar. 13, 2017).

53 Unpublished decisions are not precedent. Minn. Stat. § 480A.08, subd. 3 (2016); Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 (Minn. 2004) (“[U]npublished opinions of the court of appeals are not precedential... [and] should not be cited by the district courts as binding precedent.”). Unpublished decisions may be cited only for their “persuasive value.” Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800-01 (Minn. App. 1993).

54 *City of Grant by and through Points*, A16-1070, 2017 WL 957717, at \*7, citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 (1995).

55 Id.

56 281 Care Comm. v. Arneson, 766 F.3d 774, 789 (8th Cir. 2014).

57 Minn. Stat. § 211B.32, subd. 1.

58 281 Care Comm., 766 F.3d at 789.

59 Id. 766 F.3d at 790.

60 Id. (citation omitted).

61 Id.

62 *City of Grant by and through Points*, A16-1070, 2017 WL 957717, at \*7.

63 281 Care Comm., 766 F.3d at 790.

64 281 Care Comm., 766 F.3d at 774, 790-91.

65 Id. 766 F.3d at 793.

66 Id.

67 Id (citations omitted).

68 Id. 766 F.3d at 795, quoting *Cantwell v. Conn.*, 310 U.S. 296, 310 (1940).

69 Id.

70 “Overbroad restrictions of expression are unconstitutional.” *State v. Holmberg*, 545 N.W.2d 65, 70 (Minn.App.1996), review denied (Minn. May 21, 1995) (citing *New York v. Ferber*, 458 U.S. 747, 769 (1982)). A statute is overbroad “if it deters the exercise of First Amendment rights by unnecessarily punishing constitutionally protected along with unprotected activity.” *Matter of Welfare of S.L.J.*, 263 N.W.2d 412, 417 (Minn.1978).

71 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

72 *Carlson*, 639 N.W.2d at 889.

73 *In re Hibbing Taconite Mine and Stockpile Progression*, 888 N.W.2d 336, 344 (Minn. App. 2016) quoting *Nelson v. Scblener*, 859 N.W.2d 288, 291-92 (Minn. 2015).

74 *In re Hibbing Taconite Mine and Stockpile Progression*, 888 N.W.2d at 344 quoting *Senior Citizens Coal. of Ne. Minn. v. Minn. Pub. Utils. Comm'n*, 355 N.W.2d 295, 302 (Minn. 1984); see also *Rowe v. Dep't of Emp't & Econ. Dev.*, 704 N.W.2d 191, 194 (Minn.App.2005) (“An agency's action taken without statutory authority ordinarily is void.”).

75 See e.g. Ballotpedia; [https://ballotpedia.org/Voter\\_guides](https://ballotpedia.org/Voter_guides).

76 OAH Compl. (Oct. 24, 2016), OAH Rec. 1. The only “official” voters guide for general elections is provided by the Minnesota Secretar of State online.

77 Minn. Stat. § 211B.01, subd. 2.

78      Id.  
79      OAH Compl. ¶ 3 (Oct. 24, 2016), OAH Rec. 1 (emphasis added).

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2017 WL 2979581 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

Barbara LINERT, Respondent,  
Steven TIMMER, Respondent,  
v.

Michelle MACDONALD, Relator,  
MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS, Respondent.

No. A17-0127.  
May 1, 2017.

**Brief of Respondents Barbara Linert and Steven Timmer**

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## \*1 STATEMENT OF THE ISSUES

1. Subject-matter jurisdiction is a tribunal's authority to hear the type of dispute at issue and to grant the type of relief sought. The Office of Administrative Hearings (“OAH”) has jurisdiction over complaints alleging violations of [Minn. Stat. § 211B.02](#), which prohibits knowingly false claims “stating or implying that a candidate... has the support or endorsement of a major political party or party unit or of an organization.” In a Complaint filed with the OAH, Respondents Barbara Linert and Steven Timmer alleged that Relator Michelle MacDonald knowingly and falsely claimed the endorsement of the “GOP’s Judicial Selection Committee 2016,” when she had received no such

endorsement.<sup>1</sup> The OAH concluded that MacDonald had knowingly and falsely claimed an endorsement that she had not received.<sup>2</sup>

Did the OAH have subject-matter jurisdiction over the Complaint and subsequent proceedings?

Yes. MacDonald raises a new argument on appeal related to the meaning of the term “campaign material” - a term that is irrelevant to this matter.<sup>3</sup> She claims that this argument pertains to the OAH’s subject-matter jurisdiction.<sup>4</sup> MacDonald raised a different argument related to subject-matter jurisdiction below.<sup>5</sup> MacDonald’s original argument was rejected by the OAH,<sup>6</sup> and MacDonald has abandoned it on appeal.<sup>7</sup> MacDonald’s new argument is actually an argument on the merits and is waived because it was not raised below. In any event, pursuant to [Minn. Stat. § 211B.32](#), the OAH had statutory authority to hear and decide the merits of a Complaint alleging a <sup>\*2</sup> violation of [Section 211B.02](#). The OAH therefore properly exercised subject-matter jurisdiction in this matter.

Apposite Legal Authorities:

[Minn. Stat. § 211B.02](#).

[Minn. Stat. § 211B.32](#).

[Seehus v. Bor-Son Const., Inc.](#), 783 N.W.2d 144 (Minn. 2010).

**\*3** 2. To survive strict scrutiny, a statute regulating speech must be narrowly tailored to serve a compelling government interest and must not be overbroad by chilling or prohibiting a substantial amount of protected speech. [Minn. Stat. § 211B.02](#) provides that “[a] person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate... has the support or endorsement of a major political party or party unit or of an organization.”

Is Minnesota’s prohibition of knowing and objectively false claims of support or endorsement constitutional (1) on its face and (2) as applied to MacDonald’s knowing and objectively false claim of endorsement?

Yes. MacDonald raised to the OAH panel a constitutional argument regarding the effect of a 2014 Opinion of the United States Court of Appeals for the Eighth Circuit.<sup>8</sup> The OAH panel followed precedent from this Court and the Minnesota Supreme Court affirming the constitutionality of [Minn. Stat. § 211B.02](#).<sup>9</sup> MacDonald seeks review of the OAH’s Order.

Apposite Legal Authorities:

[Minn. Stat. § 211B.02](#).

[Schmitt v. McLaughlin](#), 275 N.W.2d 587, 590 (Minn. 1979).

[City of Grant ex rel. Points v. Smith](#), No. A16-1070, 2017 WL 957717 (Minn. App. Mar. 13, 2017).

[Niska v. Clayton](#), No. A13-0622, 2014 WL 902680 (Minn. App. Mar. 10, 2014).

#### **\*4 STATEMENT OF THE CASE**

Relator Michelle MacDonald seeks review of an Order by a panel of Administrative Law Judges of the Minnesota Office of Administrative Hearings (“OAH”).<sup>10</sup> In a Complaint filed with the Office of Administrative Hearings, Respondents Barbara Linert and Steven Timmer alleged that MacDonald - a candidate for the Minnesota Supreme Court - violated [Minn. Stat. § 211B.02](#) when she knowingly and falsely claimed the endorsement of the “GOP’s Judicial Selection Committee 2016.”<sup>11</sup> The OAH proceeded to conduct a prima facie review, a probable cause hearing, and an evidentiary hearing.<sup>12</sup> The OAH panel unanimously concluded that MacDonald had in fact violated [Minn. Stat. § 211B.02](#) by claiming an endorsement that MacDonald knew she had not received.<sup>13</sup> The OAH panel imposed a \$500 civil penalty.<sup>14</sup> Pursuant to [Minn. Stat. § 211B.36, subd. 5](#) and [§ 14.63](#), this Court has authority to review the OAH panel’s decision upon a petition for writ of certiorari, which MacDonald filed on January 26, 2017.

#### **\*5 STATEMENT OF FACTS**

The case arises out of a statement Relator Michelle MacDonald made to the Star Tribune newspaper during her unsuccessful 2016 campaign for a seat on the Minnesota Supreme Court. MacDonald claimed to be endorsed by the “GOP’s Judicial Selection Committee 2016.” MacDonald knew that she had received no such endorsement, and her false claim therefore violated [Minn. Stat. § 211B.02](#).

##### **I. The Republican Party of Minnesota’s endorsement process.**

The Constitution of the Republican Party of Minnesota (“RPM”) governs the party’s endorsement of candidates in general and judicial candidates in particular.<sup>15</sup> The RPM Constitution in effect in both the 2014 and 2016 state party conventions established a temporary “judicial election committee” for the purpose of “reviewing and encouraging possible candidates for endorsement as well as preparing a voters [sic] guide on all known judicial candidates and incumbent judges of the Minnesota Supreme Court and the Minnesota Court of Appeals.”<sup>16</sup> The judicial election committee was responsible for offering a report at the RPM’s state convention “before it is determined by majority vote whether endorsement shall be considered for each particular office of the Minnesota Supreme Court and \*6 the Minnesota Court of Appeals which is subject to the upcoming election.”<sup>17</sup> The chair of the judicial election committee was also tasked with giving “a report of the committee for each particular office.”<sup>18</sup> In sum, the RPM Constitution plainly did not endow the judicial election committee with authority to endorse candidates.<sup>19</sup> Instead, the judicial election committee’s authority was limited to authoring reports and recommending candidates for potential RPM endorsement.

By contrast, the delegates to RPM state convention could confer “endorsement” - by majority vote - on candidates for the Minnesota Supreme Court and Minnesota Court of Appeals. The rules for such endorsements were set forth in the RPM Constitution. There was a two-step process. First, after receiving the report of judicial election committee, the delegates to the RPM state convention would vote whether to consider endorsements of candidates for the Minnesota Supreme Court or Court of Appeals.<sup>20</sup> Second, if the delegates voted to \*7 consider such endorsements, then the convention would proceed to consider specific judicial candidates for particular offices.<sup>21</sup>

##### **II. RPM endorsement of MacDonald in 2014 but not 2016.**

Relator Michelle MacDonald unsuccessfully sought election to the Minnesota Supreme Court in both 2014 and 2016. In both election cycles, MacDonald's name was under consideration by the RPM's judicial election committee as a potential RPM endorsement candidate.<sup>22</sup> In 2014 the judicial election committee recommended MacDonald for endorsement by the RPM's state convention.<sup>23</sup> A majority of the delegates to the RPM's 2014 state convention voted to endorse MacDonald and, as a result, she received the RPM's endorsement.<sup>24</sup>

In 2016 MacDonald received no RPM endorsement. Some judicial election committee members issued a report favoring her endorsement, but a "Minority Report" argued against that position.<sup>25</sup> The Minority Report stated that endorsing MacDonald would "bring harm to the party," that she was "not qualified and would not be an effective judge," and that she had "demonstrated a lack of appropriate \*8 judicial temperament."<sup>26</sup> Because MacDonald was the only judicial candidate seeking RPM endorsement, the Minority Report urged that the convention not consider any judicial endorsements, and further, not endorse MacDonald as a candidate for the Minnesota Supreme Court.<sup>27</sup> Upon receiving the judicial election committee's reports, the delegates to the 2016 RPM state convention voted against considering any judicial candidates for endorsement.<sup>28</sup> As a result, no judicial candidates, including MacDonald, received RPM endorsement in 2016.<sup>29</sup>

### **III. MacDonald knowingly claims "endorsement" by the "GOP's Judicial Selection Committee 2016."**

After the 2016 RPM state convention, MacDonald knew that she had not received the 2016 RPM endorsement.<sup>30</sup> She also understood that the RPM's judicial election committee did not endorse candidates but instead recommended candidates for endorsement by the party.<sup>31</sup> In a May 21, 2016 interview with Alpha \*9 News, MacDonald explained: "ultimately, after my interview, and after I submitted all kinds of papers, the entire committee said 'we are going to recommend her for endorsement.'"<sup>32</sup> And again, in an August 31, 2016 letter to the Star Tribune, MacDonald explained that a majority of the judicial election committee members had "recommended [her] for endorsement" and further stated that the authors of the Minority Report had "voted against recommending [her] for endorsement."<sup>33</sup>

Despite her knowledge that she had not been endorsed by either the RPM or the RPM's judicial election committee, MacDonald misrepresented to the Star Tribune that she had received the "endorsement" of the "GOP's Judicial Selection Committee 2016."<sup>34</sup> MacDonald's statement to the Star Tribune was published on \*10 the newspaper's online voter guide.<sup>35</sup> MacDonald's voter-guide profile made clear, and MacDonald has never disputed, that the endorsement information "was provided by the candidate."<sup>36</sup>

On October 20, 2016, Respondent Steven Timmer published a blog post about MacDonald's false claim of endorsement, which he had read on the Star Tribune's website.<sup>37</sup> Timmer noted his belief that MacDonald had violated Section 211B.02 of the Minnesota Fair Campaign Practices Act.<sup>38</sup> Timmer's blog post was disseminated through social media, and eventually came to MacDonald's attention.<sup>39</sup> Upon reading the social media posts and Timmer's commentary, MacDonald contacted the Star Tribune and requested that the reference to the "GOP's Judicial Selection Committee

2016" be removed from her profile.<sup>40</sup> The newspaper obliged and removed the false endorsement from MacDonald's online profile.<sup>41</sup>

**\*11 IV. The Complaint and administrative hearings.**

On October 24, 2016, Respondent Barbara Linert - herself an RPM employee from 2005 until 2013 - and Timmer filed a Complaint for Violation of the Fair Campaign Practices Act ("Complaint") against MacDonald with the Office of Administrative Hearings ("OAH").<sup>42</sup> See [Minn. Stat. § 211B.32, subd. 1\(a\)](#). Linert and Timmer alleged that MacDonald had falsely claimed to be endorsed by the "GOP's Judicial Selection Committee 2016" in violation of Section 211B.02 of the Minnesota Fair Campaign Practices Act.

The matter proceeded according to the framework set forth in the Minnesota Fair Campaign Practices Act. See [Minn. Stat. § 211B.31-36](#). An Administrative Law Judge ("ALJ") first determined that the Complaint set forth a prima facie claim of a statutory violation.<sup>43</sup> See [Minn. Stat. § 211B.33](#). Three business days later, the ALJ held a probable cause hearing in which both sides were permitted to introduce evidence, provide testimony, and argue their position.<sup>44</sup> See [Minn. Stat.\\* § 211B.33-.34](#). At the probable cause hearing, MacDonald **\*12** admitted that she did not have the RPM's endorsement in 2016<sup>45</sup> and agreed that the RPM's judicial election committee did not have the power of endorsement:

THE COURT: ... The Judicial Election Committee made a recommendation, and the state convention proceeded to a vote on whether endorsement should be considered and decided not to consider endorsement of anyone. Is that what you're saying?

MS. MACDONALD: ... That's my understanding.<sup>46</sup>

MS. LINERT:... In my years of working at Republican Party headquarters, the term "endorsement" is a very specific term in politics that isn't bandied about recklessly. And a committee of the state party does not have the power of endorsement whatsoever. Thats all I've got.

MS. MACDONALD: Right.<sup>47</sup>

Shortly after the probable cause hearing, the ALJ concluded that there was probable cause to find a violation of [Section 211B.02](#).<sup>48</sup> A panel comprised of three OAH ALJs then held a full evidentiary hearing in which Linert, Timmer, and MacDonald presented evidence, called witnesses, and argued their legal and **\*13** factual positions.<sup>49</sup> The OAH panel heard additional evidence that the RPM did not endorse MacDonald and that the judicial election committee lacked the power to endorse a candidate.<sup>50</sup> MacDonald herself again conceded both facts.<sup>51</sup> She also made a point of distinguishing the words "support" and "endorsement":

Well, you're talking about endorsement, not support. I had the support of nearly a million people that voted for me in the 2016 election. Republicans, Democrats, whatever they were, I had their support.<sup>52</sup>

In my point of view, I was supported by them, wholeheartedly, recommended for endorsement.<sup>53</sup>

In its nine-page order and memorandum, the OAH panel unanimously concluded that MacDonald violated [Section 211B.02](#) by knowingly claiming an endorsement that she did not have.<sup>54</sup> The panel imposed a \$500 civil penalty.<sup>55</sup>

#### **\*14 LEGAL ARGUMENT**

In the heat of a campaign for public office, Relator Michelle MacDonald knowingly claimed a political endorsement that she did not receive, in violation of Minnesota law. Now, she argues the First Amendment protects her objectively false statement and should serve to strike down a simple, narrowly tailored, and critical statute. The Court should reject MacDonald's argument.

In a written statement to Minnesota's largest newspaper, MacDonald claimed that she had the endorsement of the "GOP's Judicial Selection Committee 2016." MacDonald knew that she had received no such endorsement. The Constitution of the Republican Party of Minnesota ("RPM") makes clear that the party's "judicial election committee" had no power to confer an endorsement and MacDonald received no 2016 endorsement from the RPM itself. MacDonald's endorsement claim was prohibited by [Minn. Stat. § 211B.02](#), which bars knowingly false claims "stating or implying that a candidate... has the support or endorsement of a major political party or party unit or of an organization."

On appeal MacDonald now claims that the OAH lacked subject-matter jurisdiction over this matter and that [Section 211B.02](#) is unconstitutionally overbroad on its face and as applied to her. MacDonald's arguments are foreclosed [\\*15](#) by the statutory text and longstanding precedent concluding that [Section 211B.02](#) is narrowly tailored to serve a compelling government interest and not overbroad. Courts have repeatedly affirmed that the government has a compelling interest in promoting informed voting and protecting citizens from electoral confusion and undue influence caused by outright and objective falsehoods. And this Court has already concluded that [Section 211B.02](#) is narrowly tailored to achieve that end because it prohibits only knowing claims of support or endorsement that are objectively false. In other words, [Section 211B.02](#) is not overbroad because it neither chills nor prohibits any constitutionally protected speech.

#### **I. The OAH had subject-matter jurisdiction.**

The OAH had jurisdiction here because the Complaint alleged that McDonald falsely claimed endorsement by the "GOP's Judicial Selection Committee 2016." Subject-matter jurisdiction is the "authority to hear the type of dispute at issue and to grant the type of relief sought." [Seehus v. Bor-Son Const., Inc.](#), 783 N.W.2d 144, 147 (Minn. 2010). Relevant to this matter, [Section 211B.02](#) provides:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization.

**Minn. Stat. § 211B.02.** Linert and Timmer brought a claim that MacDonald had violated **Section 211B.02** by claiming a false endorsement - that is, by claiming to \*16 the Star Tribune that she had the endorsement of the “GOP’s Judicial Selection Committee 2016.” The OAH is specifically and unequivocally empowered to hear and decide disputes about alleged violations of **Section 211B.02**. See **Minn. Stat. § 211B.32, subd. 1(a)** (“[A] complaint alleging a violation of chapter... 211B must be filed with [the OAH]”). Indeed, the OAH is the only adjudicative body authorized to hear this matter in the first instance. Id.

MacDonald nonetheless argues that the OAH lacked subject-matter jurisdiction because her false statements were re-published by a newspaper.<sup>56</sup> This is not an argument about subject-matter jurisdiction; it is an argument on the merits that MacDonald failed to raise below<sup>57</sup> and therefore waived. “A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’” \*17 *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)); see also *Big Lake Ass’n v. Saint Louis Cnty. Planning Comm’n*, 761 N.W.2d 487, 492 (Minn. 2009) (concluding that an argument raised for the first time on certiorari review had been waived); *City of Grant*, 2017 WL 957717, at \*4 n.3 (declining to consider a new contention on certiorari review because the relator “did not preserve it by presenting it to the [OAH] hearing panel”).

MacDonald’s new argument would fail even if she had not waived it. MacDonald appears to argue that some question in this matter turns on whether the Star Tribune’s voter guide constitutes “campaign material.” But the term “campaign material” has no bearing on this matter. **Section 211B.02** has two independent sentences aimed at two different types of conduct:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

**Minn. Stat. § 211B.02** (emphasis added). The first sentence (the one relevant to this matter) prohibits persons or candidates from making a knowingly false claim that a candidate has the support or endorsement of various entities; it contains no reference to “campaign material.” The second sentence of **Section 211B.02** relates \*18 to statements of support or endorsement of a candidate by an individual in “written campaign material.” Respondents alleged that MacDonald violated the first sentence of **Section 211B.02**, not the second. And the OAH panel’s decision was likewise based on a violation of the first sentence.<sup>58</sup> Thus, the definition of the term “campaign material” is irrelevant to this case.

Finally, the Star Tribune’s publication of MacDonald’s false claim of endorsement is not at issue here. MacDonald’s violation of **Section 211B.02** was due to her own false claim of endorsement - not a claim by the Star Tribune. MacDonald has repeatedly admitted that she made the endorsement claim.<sup>59</sup> The Star Tribune itself stated that the endorsement claim “was provided by the candidate.”<sup>60</sup> Apart from showing the egregious nature of MacDonald’s false claim,<sup>61</sup> the fact she made the claim to a newspaper which later published it is beside the point. The Court need not, and should not, address whether the Star Tribune’s re-publication of MacDonald’s false statement constitutes “campaign material.” See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (“Courts should \*19 think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.” (quotation omitted)); *Mainiero v. Jordan*, 105 F.3d 361, 365 n.7 (7th Cir. 1997) (“[An] appellate court does not need to address every argument, regardless of merit, urged by the appellant.”).

For all these reasons, MacDonald’s argument related to the OAH’s subject-matter jurisdiction and the term “campaign materials” should be rejected.

## II. Section 211B.02 is constitutional, both on its face and as applied to MacDonald's false claim.

This Court conducts de novo review when a statute is challenged on constitutional grounds. [State v. Final Exit Network, Inc.](#), 889 N.W.2d 296, 302 (Minn. App. 2016). Although statutes are generally presumed to be constitutional, where a statute restricts speech, the burden shifts to the government to demonstrate that the restriction is constitutional. [State ex rel. Humphrey v. Casino Mktg. Grp., Inc.](#), 491 N.W.2d 882, 885 (Minn. 1992). Nonetheless, this Court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." [State v. Hall](#), 887 N.W.2d 847, 852 (Minn. App. 2016) (quotation omitted). A content-based restriction on speech survives First Amendment strict scrutiny if the restriction is necessary to serve a \*20 compelling state interest and is narrowly drawn to serve that end.<sup>62</sup> [City of Grant](#), 2017 WL 957717, at \*7. Although such statutes must be narrowly tailored, they are not required to be "perfectly tailored." [Williams-Yulee v. Florida Bar](#), 135 S. Ct. 1656, 1671 (2015) (quoting [Burson v. Freeman](#), 504 U.S. 191, 209 (1992)).

MacDonald appears to challenge [Section 211B.02](#) as overbroad, both on its face and as it was applied to her particular conduct. MacDonald's constitutional challenge fails because [Section 211B.02](#) is narrowly tailored to serve a compelling government interest and is not unconstitutionally overbroad. [City of Grant](#), 2017 WL 957717, at \*8; [Niska v. Clayton](#), No. A13-0622, 2014 WL 902680, at \*7-8 (Minn. App. Mar. 10, 2014).

### 1. Section 211B.02 serves a compelling government interest.

The United States Supreme Court, the Minnesota Supreme Court, and this Court have each affirmed the compelling government interest protected by \*21 [Section 211B.02](#)'s prohibition of false claims of endorsement. "[P]rotecting voters from confusion and undue influence" is a compelling state interest. [Burson](#), 504 U.S. at 199 (plurality); see also [Schmitt v. McLaughlin](#), 275 N.W.2d 587, 591 (Minn. 1979) (concluding that "protecting the political process" is a compelling interest); [Daugherty v. Hilary](#), 344 N.W.2d 826, 832 (Minn. 1984) ("The Fair Campaign Practices Act... is a considered effort to promote informed voting so essential in a free society."); [City of Grant](#), 2017 WL 957717, at \*7.

"[F]alse political speech can be electorally toxic. During the election season, 'false statements, if credited, may have serious adverse consequences for the public at large.'" [Niska](#), 2014 WL 902680, at \*7 (quoting [McIntyre v. Ohio Elections Comm'n](#), 514 U.S. 334, 349 (1995)); see also [Garrison v. Louisiana](#), 379 U.S. 64, 75 (1964) (explaining that use of a "known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected"). As a result, "avoiding false speech that misleads the public regarding elections is a compelling interest." [Niska](#), 2014 WL 902680, at \*7; see also id. at \*10 ("The state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections."); [City of Grant](#), 2017 WL 957717, at \*7 ("[T]he state has a compelling interest in proscribing political speech that fraudulently misrepresents the identity of the speaker.").

\*22 [Section 211B.02](#) serves this compelling interest by prohibiting "false statements that state or imply a false endorsement that may mislead the public and harm the political process." [Niska](#), 2014 WL 902680, at \*7. The Minnesota Supreme Court has likewise concluded that the nearly identical statute which preceded [Section 211B.02](#)<sup>63</sup> served the government's interest in "protecting the political process." [Schmitt](#), 275 N.W.2d at 591.

There is also a "direct causal link" between the government's compelling interest and the restriction imposed by [Section 211B.02](#). See [Alvarez](#), 132 S. Ct. at 2549 (stating that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented"). Preventing false endorsement claims is causally linked to ensuring fair elections and protecting the political process because endorsements influence elections. See, e.g., [Weaver v. Bonner](#), 309 F.3d 1312, 1322 (11th Cir. 2002) ("Campaigning for elected office necessarily entails raising campaign funds and seeking

endorsements from prominent figures and groups in the community.”); see also *Magill v. Lynch*, 560 F.2d 22, 28 (1st Cir. 1977) (noting that “party endorsements” were “highly effective both in determining who \*23 would emerge from the primary election and who would be elected in the final election”); *Clarke v. City of Cincinnati, No. C-1-92-278, 1993 WL 761489, at \*12 (S.D. Ohio July 8, 1993)* (“The evidence shows that election to [the public office at issue] is very difficult without the endorsement... of one of the political parties....”), affd, 40 F.3d 807 (6th Cir. 1994). If the importance of endorsements in elections is in any doubt, the Court need look no further than the stringent procedures governing how and when the RPM confers an endorsement upon a candidate.<sup>64</sup>

Allowing candidates to make false claims about their endorsements would subvert the government's compelling interests in ensuring electoral integrity and avoiding voter confusion. Again, this very case proves the point: In the absence of **Section 211B.02**, MacDonald would not have been compelled to retract her false claim of endorsement to the Star Tribune, her false claim may have remained in the Star Tribune's voter guide, and additional voter confusion would have ensued.

## 2. **Section 211B.02 is narrowly tailored.**

This Court has twice held that **Section 211B.02** is narrowly tailored. *City of Grant*, 2017 WL 957717, at \*8; *Niska*, 2014 WL 902680, at \*7-8. And the Minnesota Supreme Court came to the same conclusion regarding the statute's nearly identical predecessor. *Schmitt*, 275 N.W.2d at 591; see also \*24 *City of Grant*, 2017 WL 957717, at \*8 (concluding that Schmitt foreclosed the relator's argument that **Section 211B.02** was not narrowly tailored). The reasons for this repeated conclusion are simple. To start, **Section 211B.02** prohibits nothing more than objectively false claims of support or endorsement. *Schmitt*, 275 N.W.2d at 591 (“Whether a person has the endorsement or support of a political party can be objectively determined.”); see *id.* at 590 (“untruthful speech... has never been protected for its own sake.” (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)); see also *Daugherty*, 344 N.W.2d at 832 (concluding that the Minnesota Fair Campaign Practices Act provides “ample breathing room for fullest free speech in an election without permitting serious, deliberate, and material misinformation to voting citizens”).

And **Section 211B.02** carefully avoids encroaching on potentially protected speech. It “punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization.” *Niska*, 2014 WL 902680, at \*8 (emphasis added). The statute's express limitation to knowing statements further narrows its scope by exempting “inadvertent falsehoods that contribute to the free expression of ideas.” *Id.* In sum, because **Section 211B.02**'s prohibition targets only knowing conduct and “is directed specifically at false claims of endorsement or support,” *Schmitt*, 275 N.W.2d at 591-92, the fit between the statute's means and ends could not be closer.

\*25 Despite the case law confirming **Section 211B.02**'s bespoke tailoring, MacDonald argues that the statute is overbroad and therefore unconstitutional on its face. Facial invalidation of a statute typically requires establishing “that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 472 (2010) (citation and quotation omitted). But in the First Amendment context, “a law may [also] be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.’” *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008)). “Because the overbreadth doctrine has the potential to void an entire statute, it should be applied only as a last resort and only if the degree of overbreadth is substantial and the statute is not subject to a limiting construction.” *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App. 2006) (quotation omitted); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988) (“The overbreadth doctrine is strong medicine that is used sparingly and only as a last resort.” (quotation omitted)). As a result, this Court “will not invalidate a statute merely because a challenger can predict or envision circumstances in which the statute might be applied unconstitutionally.” *Niska*, 2014 WL 902680, at \*7. A successful overbreadth challenge “must demonstrate from the text [of the statute] and from actual fact that a substantial number of \*26 instances exist in which the Law cannot be applied constitutionally.” *N.Y. State Club Ass'n*, 487 U.S. at 14 (emphasis added). Finally, “[u]nconstitutional overbreadth also does not occur

when the overbreadth can be cured through case-by-case analysis of the fact situations to which its sanctions... may not be applied.” [Niska, 2014 WL 902680, at \\*7](#) (quotation omitted).

MacDonald's overbreadth argument fails to show any instances in which [Section 211B.02](#) cannot be applied constitutionally. MacDonald's argument relies almost exclusively on her assertion that the words “support” and “endorsement” are “interchangeable.” This argument fails for at least three reasons. First, MacDonald's argument is contradicted by her own sworn testimony in which she distinguished between “support” and “endorsement.” In the evidentiary hearing, MacDonald went so far as to correct Respondent Timmer when he asked her about RPM's 2016 state convention's endorsement decision. Far from asserting that the words “endorsement” and “support” had the same meaning, MacDonald insisted on distinguishing them:

Well, you're talking about endorsement, not support. I had the support of nearly a million people that voted for me in the 2016 election. Republicans, Democrats, whatever they were, I had their support. <sup>65</sup>

MacDonald also repeatedly testified that she had been “recommended for endorsement” by the RPM's judicial election committee, which she equated with [\\*27](#) having the committee's “support.”<sup>66</sup> If the Court were to accept MacDonald's current argument that “support” and “endorsement” have the same meaning, then MacDonald's repeated statements that she had been “recommended for endorsement” would be rendered senseless.

Second, MacDonald is simply incorrect that words “support” and “endorsement” are interchangeable.<sup>67</sup> They have different meanings. See [Schmitt, 275 N.W.2d at 591](#) (distinguishing between support and endorsement by stating that “use of the initials ‘DFL’ would imply to the average voter that contestee had the endorsement or, at the very least, the support of the DFL party”).<sup>68</sup> As the OAH panel reasoned, “[i]nterpreting the words ‘support’ and ‘endorsement’ to have different meanings is also consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.”<sup>69</sup> See [Minn. Stat. § 645.16](#) (“Every law shall be construed, if possible, to give effect to all its provisions”); see also [Owens v. Federated Mut. Implement and Hardware Ins. Co., 328 N.W.2d 162, 164 \(Minn. 1983\)](#) (“[N]o word, phrase or sentence [in a statute] should be deemed superfluous, void or insignificant.”). Upon its review of the record, including testimony of witnesses who explained the RPM's endorsement process,<sup>70</sup> the OAH panel concluded that “endorsement has a specific meaning requiring more than mere support.”<sup>71</sup> Finally, to the extent there is any remaining question whether the terms “endorse” and “support” are practically or factually different, the Court should defer to the OAH's determination, because the OAH is tasked with enforcement of the Fair Campaign Practices Act and has expertise in its enforcement. See [In re Review of 2005 Annual Automatic Adjustment of Charges, 768 N.W.2d 112, 119 \(Minn. 2009\)](#) (“A presumption of correctness attaches to an agency decision, and deference is shown to an agency's conclusions in the area of [\\*29](#) its expertise.”); [City of Grant, 2017 WL 957717, at \\*3](#); see [Minn. Stat. § 211B.32, subd. 1\(a\)](#).

Third, even if MacDonald were somehow permitted to support her overbreadth challenge by merely “envision[ing] circumstances in which the statute might be applied unconstitutionally,” [Niska, 2014 WL 902680, at \\*7](#), MacDonald's hypothetical examples would nonetheless ring hollow. MacDonald first posits: “[I]f the Steele County Republicans gather and endorse MacDonald in a statewide race where the state GOP has not endorsed, the statute prohibits MacDonald from truthfully presenting that endorsement.”<sup>72</sup> But if a candidate in fact receives the endorsement of a political sub-unit or an organization, then the candidate is plainly entitled to claim that endorsement because the claim is not false. [Section 211B.02](#) prohibits claiming an endorsement that does not exist, such as when MacDonald claimed the endorsement of the “GOP's Judicial Selection Committee 2016.”

MacDonald also hypothesizes that [Section 211B.02](#) would prevent her from “describ[ing] the events of the judicial election committee unofficially endorsing her in a public bar.”<sup>73</sup> She again misses the mark because nothing in [Section](#)

211B.02 prevents MacDonald from truthfully describing events. To the contrary, and as the OAH panel itself noted, MacDonald “could have truthfully stated... \*30 that a majority of the RPM’s judicial election committee supported her candidacy.”<sup>74</sup> MacDonald is free to truthfully describe the events of the 2016 RPM convention at “public bar” or wherever else she might find an audience. **Section 211B.02** simply prohibits MacDonald from claiming an endorsement that she knows she did not receive.

Finally, MacDonald’s argument that **Section 211B.02** is not the least restrictive means of achieving the government’s compelling interest must also fail. MacDonald suggests that “counterspeech” should be the only available remedy for a candidate’s knowingly false claim of endorsement. But the “state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections.” **Niska, 2014 WL 902680, at \*10.** The very facts of this case prove the point. MacDonald made a false claim of endorsement to the state’s largest newspaper, knowing that her claim would then be disseminated far and wide. Counterspeech by an attentive few may have served to set the record straight with a limited number of voters. As MacDonald herself notes however, the Republican Party itself did nothing to dispel MacDonald’s false claim of endorsement, even as it was disseminated widely by the Star Tribune.<sup>75</sup> And the Star Tribune itself did not independently verify the statement. It was only when MacDonald became aware of allegations that she had \*31 broken the law with her false claim of endorsement, that she took any action to correct the falsity by asking the Star Tribune to delete it. When faced with a candidate who is willing to make knowingly false claims to large media outlets, counter-speakers without government support face long odds of achieving the government’s “interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections.” **Niska, 2014 WL 902680, at \*10.**

Faced with a similar overbreadth argument, this Court has previously concluded that **Section 211B.02** “does not prohibit or chill a ‘substantial amount’ of protected speech” and therefore is not unconstitutionally overbroad. *Id.* at \*8. The Minnesota Supreme Court came to the same conclusion when examining a nearly identical statute. See **Schmitt, 275 N.W.2d at 591.** Because MacDonald has not shown from the statute’s text or from actual fact that **Section 211B.02** threatens a substantial amount of protected speech, her overbreadth challenge must likewise be rejected.

### **3. 281 Care Committee is inapposite.**

MacDonald also incorrectly argues that 281 Care Committee - an Eighth Circuit Court of Appeals case which does not bind this Court - changes the well-established analysis that **Section 211B.02** passes constitutional muster. See **State ex rel. Hatch v. Employers Ins. of Wausau, 644 N.W.2d 820, 828 (Minn. App. 2002)** (“[F]ederal court interpretations of state law are not binding on state courts.”); **Jendro v. Honeywell, Inc., 392 N.W.2d 688, 691 n.1 (Minn. App. 1986)** (stating that \*32 the Minnesota Court of Appeals is bound by the statutory interpretations of the Minnesota Supreme Court and the United States Supreme Court). To start, this Court was fully aware of 281 Care Committee when City of Grant was heard and decided. The Eighth Circuit’s decision in 281 Care Committee was issued over three years before City of Grant. Compare **281 Care Committee, 766 F.3d 774 (issued on February 13, 2014)**, with **City of Grant, 2017 WL 957717 (issued on March 13, 2017)**. The relators in City of Grant quoted 281 Care Committee in both their principal and reply briefs.<sup>76</sup> In other words, with full notice, knowledge, and understanding of 281 Care Committee, this Court upheld the constitutionality of **Section 211B.02** against a First Amendment challenge less than two months ago. **City of Grant, 2017 WL 957717, at \*7-8.**

Moreover, **Section 211B.02** is far narrower and much less susceptible to abuse than the statute struck down by the Eighth Circuit in 281 Care Committee. That statute, **Minn. Stat. § 211.06**, bars “the preparation, dissemination, or broadcast of paid political advertising or campaign material... with respect to the effect of a ballot question, that is designed or tends to... promote or defeat a ballot question, that is false.” **281 Care Comm., 766 F.3d at 778** (quoting \*33 **Minn. Stat. § 211B.06, subd. 1**). **Section 211B.02**, on the other hand, simply bars knowingly false statements of endorsement or support.

The question of whether a candidate has an endorsement is objective one, easily and quickly verifiable. See [Schmitt, 275 N.W.2d at 591](#) (“Whether a person has the endorsement or support of a political party can be objectively determined.”). A statute proscribing false statements of endorsement has no impact on campaign speech and debate, except to stop intentionally false claims of endorsement. Such a statute does nothing but regulate a specific, narrow, and objectively verifiable type of speech.

On the other hand, regulating speech as to the effect of a ballot question - often a complex policy choice that voters must consider - may require regulating ideas and opinions. That type of regulation has the potential to reach a far broader swath of speech and create vexing questions of whether the statute has been violated. Experts often disagree on the effects of a policy choice. It is easy to see how one side of debate could claim that the other side's campaign ad is “false” simply because it cites the opinion of an unfriendly expert, see [281 Care Comm., 766 F.3d at 795](#) (raising concern that mere “conjecture” as to the outcome of a particular ballot measure could be challenged as false speech), or because it presents a “worst case” projection of the impact of the ballot question, [Abrahamson v. St. Louis Cty. Sch. Dist., 819 N.W.2d 129, 139 \(Minn. 2012\)](#) \*34 (assessing whether the presentation of “worst case” or “slanted” deficit projects violated [Section 211B.06](#)).

This complexity means that the statute at issue in 281 Care Committee potentially reaches much more speech, and runs a significantly greater risk of stifling the substantive “back and forth” that is the lifeblood of American political campaigns. See [281 Care Com'm., 766 F.3d at 795](#). But [Section 211B.02](#) presents no similar challenges. False statements about endorsements are not “inevitable” or necessary for “open and vigorous expression of views in public and private conversation.” See *id.* (quoting [Alvarez, 132 S. Ct. 2537, 2544](#)); see also [Alvarez, 132 S. Ct. at 2552](#) (Breyer, J., concurring) (noting that the “dangers of suppressing valuable ideas are lower” where “regulations concern false statements about easily verifiable facts”). It is easy to determine if a candidate is endorsed or supported by a party, party unit, or organization, and to say so honestly.<sup>77</sup> Because the relevant statutes are so different,<sup>78</sup> 281 Care Committee is inapposite to this case.

**\*35 4. [Section 211B.02](#) is constitutional as applied to MacDonald's conduct.**

To the extent that MacDonald raises an as-applied challenge,<sup>79</sup> the application of [Section 211B.02](#) here did not invade her constitutional rights. MacDonald's claim of endorsement by the “GOP's Judicial Selection Committee 2016” was false because the actual committee that MacDonald claims endorsed her (the RPM's judicial election committee) plainly had no power of endorsement.

MacDonald suggests that the statute prevents her from stating what actually happened: that she had the support, in the form of a recommendation for endorsement, of a majority of the judicial election committee.<sup>80</sup> But her own “as-applied” analysis fails, since the statute would allow that very statement because such a statement would be objectively true. As the OAH panel explained, MacDonald “could have truthfully stated... that a majority of the RPM's judicial election committee supported her candidacy.”<sup>81</sup> What MacDonald could not do is \*36 make a claim that is objectively false: that she received the endorsement of a committee that does not make endorsements.<sup>82</sup> “Spreading false information in and of itself carries no First Amendment credentials.” [Herbert v. Lando, 441 U.S. 153, 171 \(1979\)](#). Imposing a modest civil penalty on MacDonald for knowingly making an objectively false claim of endorsement could not and did not violate her constitutional rights.

MacDonald also repeatedly argues that she did not make a false claim of endorsement but merely exaggerated what the RPM's judicial election committee did.<sup>83</sup> That argument, like much of MacDonald's brief, rests on the false premise that “endorse” and “support” are interchangeable, such that using one over the other is harmless. As noted above,

courts in this state and elsewhere have concluded otherwise, and MacDonald's own testimony belies the claim that an "endorsement" in politics means nothing more than "support." MacDonald was familiar with the RPM's process for endorsing candidates. She had been through it once before. She deliberately stated - in writing, to a newspaper - that she had been endorsed by a committee that she knew had no such power. Her knowing statement was objectively false and misleading to the electorate. As such, she had no constitutional right to make it without consequence.

\*37 For all of these reasons, MacDonald's as-applied challenge is no more persuasive than her facial challenge and must also be rejected.

## CONCLUSION

Respondents Barbara Linert and Steven Timmer respectfully request that this Court affirm the OAH's ruling.

### Footnotes

- 1 Rec. No. 1 (Complaint at 2-3). Citations to documents contained in the OAH Record Index are cited by their Record Number ("Rec. No."), followed by a parenthetical description of the document and a pinpoint citation.
- 2 Relator's Add. (Dec. 27, 2016 Findings of Fact, Conclusions of Law and Order (hereinafter "OAH Final Order") at 5 ¶ 4; 8).
- 3 Relator's Br. 19-21.
- 4 Id.
- 5 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 101-111).
- 6 Relator's Add. (OAH Final Order at 6-7).
- 7 See Relator's Br., *passim*.
- 8 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 109).
- 9 Relator's Add. (OAH Final Order at 6-8 (citing to *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979); *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. App. Mar. 10, 2014)).
- 10 Relator's Add. (OAH Final Order). The OAH panel was comprised of Administrative Law Judges Jessica A. Palmer-Denig (presiding), Jeanne M. Cochran, and James E. LaFave.
- 11 Rec. No. 1 (Complaint at 2).
- 12 See Rec. No. 5 (Oct. 27, 2016 Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing); Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g); Rec. No. 10 (Nov. 3, 2016 Order on Probable Cause); Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g).
- 13 Relator's Add. (OAH Final Order at 5 ¶ 4; 8).
- 14 Id. at 5 ¶ 5, 9.
- 15 Rec. No. 14, Ex. 2 (RPM *Const. art. V, § 3* ("Endorsements")); see Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 20).
- 16 Rec. No. 14, Ex. 2 (RPM *Const. art. VI, § 6.B*); see also Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 128).
- 17 Rec. No. 14, Ex. 2 (RPM *Const. art. VI, § 6.C*).
- 18 Id. art. VI, § 6.D.
- 19 Relator's Add. (OAH Final Order at 2 ¶ 5 ("The RPM's judicial election committee does not have the authority to confer an endorsement. It may only recommend to the state convention delegates that a particular candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals be endorsed by the RPM." (footnotes omitted))).
- 20 Rec. No. 14, Ex. 2 (RPM *Const. art. V, § 3.C.1-2*).
- 21 Id. art. V, § 3.C.3; Relator's Add. (OAH Final Order at 3 ¶ 8).
- 22 Relator's Add. (OAH Final Order at 2 ¶ 6); Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 73- 76).
- 23 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 76).
- 24 Id.; Relator's Add. (OAH Final Order at 2 ¶ 6).
- 25 Rec. No. 14, Ex. 4 (Judicial Election Committee Minority Report).
- 26 Id. at 2-3.
- 27 Id. at 3.

28 Relator's Add. (OAH Final Order at 3 ¶¶10-11).

29 Id. at 3 ¶ 11.

30 See Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g, MacDonald Test., at 37 ("The delegates didn't even have an opportunity to endorse me.")); id. at 37 ("I mean, it's very obvious... I'm not going around saying I'm Republican endorsed because I'm not."); id. at 46 ("I wasn't endorsed by the Republican Party of Minnesota. That's very clear."); Rec No. 22 (Tr. 12/21/16 Evid. Hr'g, MacDonald Test., at 85 ("The Republican Party of Minnesota, in 2016, didn't endorse me, and I didn't say that it did. So what's your problem?")).

31 Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g, MacDonald Test., at 34 ("I was recommended for endorsement by the Judicial Election Committee to the Republican Party of Minnesota. That's the way it works." (emphasis added)); id. at 36 (Q: "The Judicial Election Committee made a recommendation, and the state convention proceeded to a vote on whether endorsement should be considered and decided not to consider endorsement of anyone. Is that what you're saying?" A: "That's my understanding." (emphasis added)); id. at 47 ("I didn't have the opportunity to be endorsed, even though I was recommended for endorsement by the GOP Judicial Election Committee." (emphasis added)); Rec No. 22 (Tr. 12/21/16 Evid. Hr'g, MacDonald Test., at 84 ("In my point of view, I was supported by them, wholeheartedly, recommended for endorsement." (emphasis added))).

32 Rec. No. 1 (Complaint at 3); Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 86). Of course, as shown by the Minority Report, MacDonald's statement that "entire committee" had recommended her for endorsement was objectively false.

33 Rec. No. 14, Ex. 6 (August 31, 2016 Letter from MacDonald to Star Tribune Media Company LLC at 2 (emphases added)).

34 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 80-81); Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g at 37). Among the problems with MacDonald's misrepresentation - though not the focus of this appeal - is the fact that no Minnesota "GOP Judicial Selection Committee" exists. As noted above, the committee's actual name was "judicial election committee." Relator's Add. (OAH Final Order at 2 ¶¶ 2-5; 3-4 ¶¶ 13-14).

35 Rec. No. 26 (OAH Final Order at 3 ¶ 13); Rec. No. 14, Ex. 1 (Star Tribune Profile at 2).

36 Rec. No. 14, Ex. 1 (Star Tribune Profile at 2).

37 Rec. No. 8 (MacDonald Prelim. Resp. to Compl., Ex. 5 (Timmer Blog Post)).

38 Id.

39 See Rec. No. 8 (MacDonald Prelim. Resp. to Compl. at 3); Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g at 37-39); Relator's Add. (OAH Final Order at 4 ¶ 16).

40 Id. at 4 ¶ 17

41 Id.

42 Rec. No. 1 (Complaint).

43 Rec. No. 5 (Oct. 27, 2016 Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing).

44 See Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g).

45 Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g, MacDonald Test., at 37 ("The delegates didn't even have an opportunity to endorse me.... I mean, it's very obvious... I'm not going around saying I'm Republican endorsed because I'm not.")).

46 Id. at 36 (emphasis added).

47 Id. at 46; see also id. at 47 ("I didn't have the opportunity to be endorsed, even though I was recommended for endorsement by the GOP Judicial Election Committee." (emphasis added)).

48 Rec. No. 10 (Nov. 3, 2016 Order on Probable Cause).

49 See generally Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g).

50 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g, Niska Test., at 28 ("No preconvention committee that I've ever heard of in the Republican Party of Minnesota has the power to endorse a candidate that's being considered for endorsement at that convention. It's up to the convention to decide whether to endorse or not.")); see also id. at 27-28; 50, and id., Linert Test., at 55 ("Republican Party committees do not have the power to endorse candidates.").

51 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g, MacDonald Test., at 85 ("The Republican Party of Minnesota, in 2016, didn't endorse me, and I didn't say that it did. So what's your problem?")); id. at 83-84 (Q: "The Judicial Election Committee merely recommended you; isn't that true?" A: "Yes, they recommended me for endorsement by the Republican Party of Minnesota in 2016.").

52 Id. at 89 (emphasis added).

53 Id. at 84 (emphasis added).

54 Relator's Add. (OAH Final Order at 5 ¶ 4); id. at 8 ("Respondent knew she had not been 'endorsed' by the judicial election committee.").

55 Id. at 5, 9.

56 Respondents note that MacDonald's new argument related to "subject-matter jurisdiction" is entirely different from the one that she raised before the ALJ panel. There, MacDonald's counsel argued that the panel lacked "subject-matter jurisdiction" because her claim of endorsement by the "GOP's Judicial Election Committee 2016" was not a "claim... that a candidate has the support or endorsement of a major political party or party unit or of an organization." (Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 101-105).) The ALJ panel correctly rejected that argument (see Relator's Add. (OAH Final Order at 6-7)), and MacDonald has abandoned it on appeal. In any event, that line of argument is foreclosed by this Court's common-sense definition of the term "organization" in [City of Grant ex rel. Points v. Smith, No. A16-1070, 2017 WL 957717, at \\*5-6 \(Minn. App. March 13, 2017\)](#), which clearly encompasses an organization such the RPM's judicial election committee.

57 Not only did MacDonald fail to raise this argument below, neither she nor her attorney uttered the words "campaign material" at either the probable cause hearing or the evidentiary hearing. See Rec. Nos. 21 & 22, *passim*.

58 Relator's Add. (OAH Final Order at 5 ¶ 4; 6-8).

59 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 80-81); Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hearing at 37).

60 See Rec. No. 14, Ex. 1 (Star Tribune Profile at 2).

61 The fact that MacDonald made her false claim of endorsement to Minnesota's largest newspaper highlights the deliberate and intentional nature of her conduct. This was not a stray comment to one voter; it was a written representation that MacDonald knew was destined for mass dissemination.

62 Because Minnesota courts have applied strict scrutiny to [Section 211B.02](#) (and its predecessor), Respondents apply that standard here. Respondents note, however, that strict scrutiny may be an overly stringent test. In [United States v. Alvarez](#), concurring justices in a fragmented Supreme Court plurality applied intermediate scrutiny to a statute that, like [Section 211B.02](#), prohibits "only false factual statements made with knowledge of their falsity and with the intent that they be taken as true." [132 S. Ct. 2537, 2552-53 \(2012\)](#) (Breyer, J., concurring); see [281 Care Comm. v. Arneson, 766 F.3d 774, 782-84 \(8th Cir. 2014\)](#) ("In fact, it was largely (if not solely) because the regulation at issue in Alvarez concerned false statements about easily verifiable facts that did not concern subjects often warranting greater protection under the First Amendment, that the concurring Justices applied intermediate scrutiny."). In any event, because [Section 211B.02](#) survives strict scrutiny, it also survives intermediate scrutiny.

63 [Minn. Stat. § 210A.02](#) (repealed and replaced by [Section 211B.02](#) in 1988) stated: "No person or candidate shall knowingly, either by himself or by any other person, while such candidate is seeking a nomination or election, make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization, when in fact the candidate does not have such support or endorsement." See [Schmitt, 275 N.W.2d at 590](#).

64 See, e.g., Rec. No. 14, Ex. 2 (RPM [Const. art. V, § 3](#)); Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hr'g at 46); Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 16-24; 28).

65 Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g at 89 (emphasis added)).

66 Id. at 84 ("In my point of view, I was supported by them, wholeheartedly, recommended for endorsement." (emphasis added)). See also Rec. No. 21 (Tr. 11/1/16 Prob. Cause Hearing at 36 (Q: "The Judicial Election Committee made a recommendation, and the state convention proceeded to a vote on whether endorsement should be considered and decided not to consider endorsement of anyone. Is that what you're saying?" A: "That's my understanding." (emphasis added)); id. at 47 ("I didn't have the opportunity to be endorsed, even though I was recommended for endorsement by the GOP Judicial Election Committee." (emphasis added))).

67 Relator's Br. at 12 ("The words 'endorsement' and 'support' can be used interchangeably.... '[E]ndorsement' does mean 'support.'").

68 See also [In re Hecht, 213 S.W.3d 547, 573 \(Tex. Spec. Ct. Rev. 2006\)](#) (interpreting "endorsement," in the context of a Texas Supreme Court justice's praise of a U.S. Supreme Court nominee, to "mean more than support, that is more than spoken praise"); see also [N.C. Code of Judicial Conduct, Canon 7](#) (noting that endorsement means to "knowingly and expressly request, appeal, or announce publicly that other persons should support a specific individual in that person's efforts to be elected to public office"); [In re Hecht, 213 S.W.3d at 571-72](#) (noting that North Carolina's definition of endorsement, in its Code of Judicial Conduct, requires "more than mere support" and that North Carolina has concluded that "endorsing" [is] a term of art within the political process").

69 Relator's Add. (OAH Final Order at 7).

70 See, e.g., Rec. No. 22 (Tr. 12/21/16 Evid. Hr'g, Linert Test., at 55 (“Part of my duties [as office manager of the Republican Party of Minnesota from 2005 until 2013] included planning conventions and working with the endorsement process. I came to understand the gravity of what an endorsement means, whether given by the state party or a local party unit.”)).

71 Relator's Add. (OAH Final Order at 7).

72 Relator's Br. at 13.

73 Id. at 18.

74 Relator's Add. (OAH Final Order at 8).

75 Relator's Br. 18.

76 Respondents' Add. at 5 (Relators' Br. at 27, City of Grant ex rel. Points v. Smith, No. A16-1070 (filed Sept. 9, 2016)); Respondents' Add. at 10-12 (Relators' Reply Br. at 13-14, City of Grant ex rel. Points v. Smith, No. A16-1070 (filed Oct. 24, 2016)).

77 Indeed, other states have determined that it is important to bar objectively false claims of endorsement in elections. See, e.g., [Ohio Rev. Code § 3517.21\(B\)\(8\)](#) (proscribing a false statement that a candidate is endorsed by a “person or publication”). Even while the Sixth Circuit has struck down broader portions of Ohio's statute (those more similar to [Section 211B.06](#)), the Ohio provision most similar to [Section 211B.02](#) still stands. See [Susan B. Anthony List v. Driehaus](#), 814 F.3d 466, 470, 476 (6th Cir. 2016) (striking on First Amendment grounds [Ohio Rev. Code § 3517.21\(B\)\(9\)-\(10\)](#)).

78 There are other important differences between the statutes. The potential penalty for a violation of [Section 211B.06](#) (a gross misdemeanor) is more severe than the potential penalty for a violation of [Section 211B.02](#). Compare [Minn. Stat. § 211B.06, subd. 1](#), with [Minn. Stat. § 211B.02](#), and [Minn. Stat. § 211B.19](#).

79 Compare Relator's Br. at 10-11 (setting out the standard for a facial overbreadth challenge), with id. at 8 (“the application of Minnesota's campaign statute under [§ 211B.02](#), as applied to MacDonald is unconstitutional”), 14 (“Grant's conclusion cannot stand under the circumstances of this case as applied to MacDonald under the constitutional overbreadth doctrine”), and 21 (“[Minnesota Statute § 211B.02](#) is unconstitutional as applied to the Appellant [sic] MacDonald and thus, the OAH prosecution must be reversed.”).

80 Relator's Br. at 18.

81 Relator's Add. (OAH Final Order at 8).

82 Id. (“Instead, her statement that the committee endorsed her, when it had no authority to ‘endorse,’ was a false claim of endorsement that Respondent knew to be false.”).

83 Relator's Br. at 8, 18-19.

2017 WL 2979582 (Minn.App.) (Appellate Brief)  
Court of Appeals of Minnesota.

Barbara LINERT, Respondent,  
Steven TIMMER, Respondent,  
v.

Michelle MACDONALD, Relator.

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS, Respondent.

No. A17-0127.  
May 10, 2017.

**Relator's Reply Brief**

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\*1 The instant Reply Brief is offered by the Relator Michelle MacDonald to address specific counter-points to the Respondents Barbara Linert and Steven Timmer <sup>1</sup> argument presented by their counsel.

### I. The OAH did not have subject matter jurisdiction to entertain the Linert Compliant under § 211B.02

Ms. Linert appears to have mischaracterized our argument about the OAH's lack of subject matter jurisdiction by asserting that Ms. MacDonald's statements were "re-published by a newspaper."<sup>2</sup> Nowhere did we assert that proposition. The argument is based on the definition of "campaign material" and subject matter jurisdiction cannot be waived.<sup>3</sup> And while Ms. Linert might be correct that counsel nor MacDonald may not have uttered the words "campaign material," the OAH crystallized the issue:

The issue in this case is whether Respondent [Ms. MacDonald] falsely implied in campaign material related to her candidacy for the Minnesota Supreme Court that she had the endorsement of the Republican Party of Minnesota, in violation of Minnesota Statute Section 211B.02.<sup>4</sup>

Nothing has been waived. Moreover, Ms. Linert has not identified what campaign material Ms. MacDonald is responsible for. Nor has Ms. Linert identified the basis for a newspaper insert or section as falling within the definition of "campaign material." It is "not irrelevant" to this case as Ms. Linert suggests.<sup>5</sup>

\*2 Moreover, for argument's sake, Ms. MacDonald did have the support of individuals of the RPM. First, the statement would be true. Second, if this Court determines a newspaper insert as "campaign material," an argument Ms. Linert does not make and is therefore waived,<sup>6</sup> there is no evidence in this record to support a violation of Minnesota Statute § 211B.02, and Ms. Linert identifies no such evidence.<sup>7</sup>

Notably, Ms. Linert's argument also proves our overbreadth point. Here, Ms. Linert appears to argue that any speech, including interviews with the press and published by a newspaper, that her statement of obtaining support of RPM members - regardless of political hyperbole - would be subject to prosecution under § 211B.02.

Likewise, we are disinclined to agree with Ms. Linert's observation or reading of the transcript involving the testimony of Ms. MacDonald as stating she "repeatedly admitted that she made the endorsement claim" and providing only two cites to the record.<sup>8</sup> Notably, Ms. MacDonald testified that she was not endorsed by the "Republican Party in 2016" and that it would "be ludicrous" for anyone to believe it:

Q. Including the line under endorsements, GOP's judicial Selection Committee 2016.

A. Yes, I supplied that, and it was perfectly accurate. And as you can see, the difference, you know, it was - It's very obvious, and should be obvious to you, Mr. Timmer, in reading this, that I was not rec - I was not endorsed by the Republican Party in 2016. So, to me, it's ludicrous that anybody would see this and \*3 thing that I was saying that I was endorsed by the Republican Party in 2016.<sup>9</sup>

Regardless, subject matter jurisdiction does not expend scarce judicial resources but ensures that either a court or here, the OAH, has "not only [the] authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide."<sup>10</sup> "Minnesota courts have consistently recognized that statutory requirements limiting a court's jurisdiction are threshold requirements that must be complied with before a court can exercise jurisdiction."<sup>11</sup>

**II. The application of the overbreadth doctrine is appropriate here in light of developing constitutional law as applied to statutes which deliberately seek to curtail protected political speech.**

Minnesota Statute § 211B.02 embraces the civil and criminal prosecution of political speech targeting falsity. However, false speech does not fall outside the protections of the First Amendment, especially political speech.<sup>12</sup> Yet, here, the evidence does not reveal Ms. MacDonald knowingly led others to believe she had the support of the Republican Party of \*4 Minnesota (“RPM”). No one testified that he or she believed she had the endorsement of support of the RPM; Complainants offered no evidence that any reader held this view. The underlying OAH complaint was conjecture of what might happen, but § 211B.02 prohibits conjecture or possibilities of false political speech. And while Ms. MacDonald testified she understood she did not have the support or endorsement of the RPM,<sup>13</sup> she did not testify of knowingly leading others to believe she did.<sup>14</sup> As the appellate court in *Niska v. Clayton*, relied upon by the Ms. Linert, two elements must be met for which § 211B.02 prohibits: (1) claims of support; and (2) “only when those claims are false.”<sup>15</sup> Ms. MacDonald’s statements were not false. She had the support of a group of individual members of a major political party, regardless of whether she identified the group as a “judicial selection committee” correctly or not. As testimony from witness Harry Niska, a delegate to the state Republican Party convention in 2016 (and had been since 2010<sup>16</sup>) reveals:

Q. Would you agree that your statement in your report that JEC majority decision to recommend Michelle MacDonald for endorsement was, on behalf of the Judicial Election Committee, an expression of the sentiment of the judicial Election Committee in support of Michelle Mac Donald?

A. That is how I understood the sentiment of the majority of the judicial Election Committee.<sup>17</sup>

\*5 There should be no question that a person's affiliation with a particular political party - whether Republican, Democratic, Socialist, or Communist - the announcement of a person's identity with the corresponding party and thus, its policies, is protected political speech. But under § 211B.02, a person's affiliation is sufficient to be prosecuted regardless of the truthfulness of the statement. For example, if a minor subgroup such as the Blue Republicans,<sup>18</sup> unaffiliated with a major political party, endorses or supports a candidate and publishes it, not only is the candidate subject to prosecution, but any prosecution under § 211B.02 curtails not only political speech of anyone associated with the Blue Republican, but also truthful political speech. In short, the statute does prohibit truthful speech.

Here, the argument is whether Ms. MacDonald had the support or endorsement of individual RPM members who also served on a judicial selection committee. It curtails not only Ms. MacDonald's free exchange of ideas, but also that of every other individual active in politics including the RPM members, DFL members, any independent voter or any other person that may have heard of this development. In other words, § 211B.02 prevents all political speech as it relates to any activity that had occurred, here, within the party. Not only is political hyperbole subject to civil and possible criminal prosecution, but also mistaken facts expressed as known facts that are “false.” The man sitting at the bar stool of a local pub or the woman sitting at dinner with colleagues engaged in any discussion of political \*6 activities regarding support or endorsement within a party is subject to prosecution, which is the very definition of overbreadth. They could not repeat what had happened to Ms. MacDonald without fear of prosecution under § 211B.02.

As Ms. Linert questioned Ms. MacDonald, Ms. Linert identifies the very problem of the statute at issue:

Q. So can we agree, also that if there are a bunch of Republican delegates who happen to be at Culver's Restaurant having lunch, and they decide amongst themselves at the table that they would recommend you for a judicial candidacy, that does not constitute an endorsement?

A. It does not constitute an endorsement of the Republican Party of Minnesota, no. That's a specific endorsement I didn't get and I got two years before...<sup>19</sup>

Q. Well, my point is begin with that question as that they can't even say, us as a group of Republicans today at Culver's, are endorsing you...<sup>20</sup>

A round-table discussion at Culver's should be protected political speech and not subject to prosecution under [Minnesota Statute § 211B.02](#), but Ms. Linert would have this Court believe otherwise which places political activists and innocent individuals of every walk of life in jeopardy of civil and possible criminal prosecution for what they thought would be protected First Amendment political speech.

## \*7 CONCLUSION

[Minnesota Statute § 211B.02](#) is unconstitutional as applied to the circumstances of this case as being overbroad and, thus, the OAFI decision against the Relator Michelle MacDonald should be reversed.

### Footnotes

- 1 Referred collectively as "Ms. Linert" for the sake of readability.
- 2 Linert Resp Br. at 16.
- 3 MacDonald Princ.Br. at 19n.73.
- 4 Hring Transcr. 7:15-19 (Dec. 21, 2016) (emphasis added).
- 5 Linert Resp. Br. at 18.
- 6 *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citations omitted).
- 7 For instance, there is no evidence whether Ms. Linert did not have written permission from the individuals. Therefore, she could not have been found in violation of the underlying statute.
- 8 Linert Resp. Br. at 18 (emphasis omitted).
- 9 Firing Transc. 81:1-10.
- 10 *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App.1995) (quotations omitted), review denied (Minn. May 31, 1995).
- 11 *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. App. 2004) quoting *State v. Rojas*, 569 N.W.2d 418, 420 (Minn. App.1997).
- 12 See [281 Care Comm. v. Arneson](#), 766 F.3d 774, 783 (8th Cir. 2014). The First Amendment of the United States Constitution states: "Congress shall make no law... abridging the freedom of speech." [U.S. Const. amend. I](#). The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment. [McIntyre v. Ohio Elections Commn.](#), 514 U.S. 334, 346 (1995) "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." [McCutcheon v. Fed. Election Commn.](#), 134 S. Ct. 1434, 1462 (2014)(Thomas, J. concurring) (internal quotations omitted). It is, particularly, at the heart of the protections of the First Amendment, [281 Care Committee I](#), 638 F.3d at 635, and is, "of course,... at the core of what the First Amendment is designed to protect." [Morse v. Frederick](#), 551 U.S. 393, 403 (2007) (internal quotation omitted).
- 13 E.g., Hring Transc. 81:1-10.
- 14 E.g. id.
- 15 [Niska v. Clayton](#), A13-0622, 2014 WL 902680, at \*8 (Minn. App. Mar. 10, 2014).
- 16 Hring Transc. 16: 11-17.
- 17 Hring Transc. 49:7-13. Notably, Harry Niska, as also asked whether the judicial Election Committee was a party unit to which he answered "no."
- Q. Is the judicial Election Committee, per your understanding, of the Republican Party of Minnesota Constitution a party unit?
- A. No. Hring Transc. 37:23-25; 38:1.

Barbara LINER, Respondent, Steven HUMMER, ..., 2017 WL 2979582...

18 http://www.bluerepublican.org/: "Blue Republican is a grass roots group that moves the dial of mainstream culture and politics toward liberty as the politics of love. We put principle before party and pragmatism before purism by finding common ground among Americans..."

19 Hring Transcr. at 98:16-24.

20 HringTranscr. at 99:7-9.

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901 N.W.2d 664  
Court of Appeals of Minnesota.

Barbara LINERT, et al., Respondents,  
v.

Michelle MACDONALD, Relator,  
Office of Administrative Hearings, Respondent.

A17-0127

Filed September 11, 2017

### Synopsis

**Background:** Action was brought against candidate for state Supreme Court, alleging that candidate violated fair campaign practices statute by falsely claiming that a party's judicial-election committee endorsed her. A panel of three ALJs from Office of Administrative Hearings determined that candidate violated the statute by knowingly claiming an endorsement that she had not in fact received. Candidate appealed.

**Holdings:** The Court of Appeals, Bjorkman, J., held that:

[1] Office of Administrative Hearings (OAH) had subject-matter jurisdiction over claim;

[2] campaign statute was not overbroad in violation of the First Amendment; and

[3] threat of prosecution under campaign statute did not chill truthful speech.

Affirmed.

West Headnotes (16)

### [1] Courts

#### 🔑 Jurisdiction of Cause of Action

“Subject-matter jurisdiction” refers to the tribunal’s authority to hear the type of dispute at issue and to grant the type of relief sought.

[Cases that cite this headnote](#)

### [2] Appeal and Error

#### 🔑 Organization and Jurisdiction of Lower Court

#### Courts

#### 🔑 Waiver of Objections

Because subject-matter jurisdiction goes to the authority of the decision-maker to hear the case, it may not be waived and can be raised for the first time on appeal.

[Cases that cite this headnote](#)

### [3] Appeal and Error

#### 🔑 Subject-matter jurisdiction

Subject-matter jurisdiction is a question of law reviewed de novo.

[Cases that cite this headnote](#)

### [4] Judges

#### 🔑 Jurisdiction or authority to remove or discipline

Office of Administrative Hearings (OAH) had subject-matter jurisdiction over claim brought against candidate for Supreme Court alleging that candidate falsely claimed that a judicial-election committee endorsed her; legislature expressly provided that complaints asserting false-endorsement claims must be filed with and decided by the OAH. [Minn. Stat. Ann. § 211B.02](#).

[Cases that cite this headnote](#)

### [5] Appeal and Error

#### 🔑 Statutory or legislative law

The constitutionality of a statute is a question of law, which is reviewed de novo.

[1 Cases that cite this headnote](#)

### [6] Constitutional Law

#### 🔑 Freedom of speech, expression, and press

#### Constitutional Law

#### 🔑 Freedom of speech, expression, and press

While statutes generally carry a presumption of constitutionality, a statute restricting speech does not; the burden rests with the government to demonstrate that such a statute is constitutional.

[1 Cases that cite this headnote](#)

**[7] Constitutional Law**

🔑 Content-Based Regulations or Restrictions

**Constitutional Law**

🔑 Strict or exacting scrutiny; compelling interest test

The First Amendment establishes that the government generally has no power to restrict expression because of its content; statutes regulating the content of speech are presumptively invalid and subject to strict-scrutiny analysis. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

**[8] Constitutional Law**

🔑 Strict or exacting scrutiny; compelling interest test

Content-based restrictions on speech survive First Amendment strict-scrutiny analysis only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

**[9] Constitutional Law**

🔑 Narrow tailoring

A statute is narrowly tailored for free speech purposes if it advances a compelling state interest in the least restrictive means among available, effective alternatives. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

**[10] Constitutional Law**

🔑 Political Rights and Discrimination

A compelling state interest that survives First Amendment scrutiny is promoting informed voting and protecting the political process. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

**[11] Constitutional Law**

🔑 Elections

**Election Law**

🔑 Misrepresentation of campaign authority

Campaign statute governing false claims of support, violated by State Supreme Court candidate who falsely claimed that a party's judicial-election committee endorsed her, was not overbroad in violation of the First Amendment; statute only prohibited a candidate from making a knowingly false claim, statute did not prohibit a candidate from truthfully reporting receipt of a party sub-unit's endorsement, and counterspeech, even media statements and retractions, was not an effective alternative means to combat false claims of support or endorsement. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. § 211B.02](#).

[Cases that cite this headnote](#)

**[12] Constitutional Law**

🔑 Overbreadth in General

A statute is “overbroad” on its face, for First Amendment purposes, if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

**[13] Constitutional Law**

🔑 Substantial impact, necessity of

A statute is not substantially overbroad when its excessive sweep can be cured on a case-by-case basis through an as-applied challenge.

[Cases that cite this headnote](#)

**[14] Constitutional Law**

🔑 Use as last resort; sparing use

Courts apply the overbreadth doctrine only as a last resort.

[Cases that cite this headnote](#)**[15] Constitutional Law****Election Law**

Threat of prosecution under campaign statute governing false claims of support, which was violated by State Supreme Court candidate who falsely claimed that a party's judicial-election committee endorsed her, did not chill truthful speech; statutory complaint process contained procedural safeguards to protect against abuse because complaints filed under statute were subject to mandatory *prima facie* review by an ALJ within three days of filing. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. § 211B.02](#).

[Cases that cite this headnote](#)**[16] Constitutional Law****Election Law****Election Law**

Statute which prohibits candidates from knowingly making false claims of support or endorsement was not facially overbroad in violation of the First Amendment. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. § 211B.02](#).

[Cases that cite this headnote](#)*Syllabus by the Court*

[Minn. Stat. § 211B.02 \(2016\)](#), which prohibits candidates from knowingly making false claims of support or endorsement, is not facially overbroad in violation of the First Amendment.

\*[666](#) Office of Administrative Hearings, File No. OAH 71-0320-33929

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[Lori Swanson](#), Attorney General, St. Paul, Minnesota (for respondent Office of Administrative Hearings).

Considered and decided by [Bjorkman](#), Presiding Judge; [Cleary](#), Chief Judge; and [Bratvold](#), Judge.

**OPINION**

[BJORKMAN](#), Judge

Relator challenges an order issued by the Minnesota Office of Administrative Hearings (OAH) determining that she violated [Minn. Stat. § 211B.02](#), arguing OAH lacked jurisdiction and that the statute is unconstitutionally overbroad. We affirm.

**FACTS**

In 2016, relator Michelle MacDonald was a candidate for the Minnesota Supreme Court. During her campaign, she sought the endorsement of the Republican Party of Minnesota (the RPM), which had endorsed her during her unsuccessful 2014 campaign. Prior to the RPM's 2016 state convention, MacDonald was interviewed by the party's judicial-election committee. The committee is authorized to recommend candidates for endorsement by the RPM but does not itself endorse candidates. The committee voted 20-2 to recommend MacDonald's endorsement to the RPM. The RPM ultimately decided not to endorse any candidate in the Minnesota Supreme Court race. MacDonald therefore did not receive the RPM's endorsement.

On October 18, 2016, the Star Tribune published a "Voter Guide" with profiles of candidates running for various state offices, including MacDonald. The profile was based on information submitted by MacDonald. The "Endorsements" section indicated that MacDonald received an endorsement from "GOP's Judicial Selection Committee 2016." On October 21, MacDonald requested that the claimed

endorsement be removed from her candidate profile. The Star Tribune removed the endorsement.

Respondents Barbara Linert and Steven Timmer (Linert) subsequently filed a complaint with OAH. They alleged that, in claiming the judicial-election committee endorsed her, MacDonald violated Minn. Stat. § 211B.02. An administrative-law judge (ALJ) found probable cause to believe that MacDonald violated the statute. Following an evidentiary hearing, a panel of three ALJs determined that MacDonald violated the statute by knowingly claiming an endorsement that she had not in fact received. OAH imposed a \$500 civil penalty. \*667 MacDonald appeals by writ of certiorari.

## ISSUES

- I. Did OAH have subject-matter jurisdiction?
- II. Is Minn. Stat. § 211B.02 unconstitutionally overbroad?

## ANALYSIS

### I. OAH had subject-matter jurisdiction.

[1] [2] [3] Subject-matter jurisdiction refers to the tribunal’s “authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Because subject-matter jurisdiction goes to the authority of the decision-maker to hear the case, it may not be waived and can be raised for the first time on appeal. *Witzke v. Mesabi Rehab. Servs., Inc.*, 768 N.W.2d 127, 129 (Minn. App. 2009). Subject-matter jurisdiction “is a question of law that we review de novo.” *Nelson v. Schleiner*, 859 N.W.2d 288, 291 (Minn. 2015).

[4] MacDonald argues that OAH lacked subject-matter jurisdiction because the newspaper’s voter guide does not constitute campaign material, as defined by Minn. Stat. § 211B.01 (2016). But this argument relates to the merits of Linert’s complaint, not whether OAH had authority to consider it.<sup>1</sup> Indeed, the legislature expressly provided that complaints asserting false-endorsement claims must be filed with and decided by OAH in the first instance. Minn. Stat. § 211B.32, subd. 1(a) (2016). Accordingly, OAH had subject-matter jurisdiction.

### II. Minn. Stat. § 211B.02 is not unconstitutionally overbroad.

[5] [6] The constitutionality of a statute is a question of law, which we review de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). While statutes generally carry a presumption of constitutionality, a statute restricting speech does not; the burden rests with the government to demonstrate that such a statute is constitutional. *Hornell Brewing Co. v. Minn. Dep’t of Pub. Safety*, 553 N.W.2d 713, 716 (Minn. App. 1996).

Section 211B.02 provides:

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

Because the statute prohibits speech based on its content, the statute implicates the protection afforded by the First Amendment.

[7] [8] [9] The First Amendment, which applies to the states through the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech.” *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014) (quoting U.S. Const. amend. I) (quotation marks omitted). The amendment establishes that the government generally “has no power to restrict expression because of its ... content.” *Id.* (quotation omitted). Statutes regulating the content of speech are presumptively invalid and subject to strict-scrutiny \*668 analysis. *State v. Crawley*, 819 N.W.2d 94, 100 (Minn. 2012). “Content-based restrictions on speech survive First Amendment strict-scrutiny analysis only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end.” *Prolife Minn. v. Minn. Pro-Life Comm.*, 632 N.W.2d 748, 753 (Minn. App. 2001),

review denied (Minn. Oct. 24, 2001). A statute is narrowly tailored if it advances a compelling state interest in the “least restrictive means among available, effective alternatives.” *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666, 124 S.Ct. 2783, 2791, 159 L.Ed.2d 690 (2004).

[10] One such compelling state interest is promoting informed voting and protecting the political process. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49, 115 S.Ct. 1511, 1519-20, 131 L.Ed.2d 426 (1995) (stating that a state has a special interest during elections in preventing false statements that, if credited, may have serious consequences for the public); *Daugherty v. Hilary (In re Contest of Election in DFL Primary)*, 344 N.W.2d 826, 832 (Minn. 1984) (stating that promoting informed voting is “essential in a free society”); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979) (determining the state has a compelling interest in “protecting the political process”). MacDonald does not appear to challenge this jurisprudence. We are persuaded that section 211B.02’s prohibition against false claims of support or endorsement serves a compelling state interest.

[11] [12] [13] [14] MacDonald contends that section 211B.02 is not narrowly tailored to serve this compelling interest because it is facially overbroad. “A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights.” *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App. 2006) (quotation omitted), review denied (Minn. Mar. 28, 2006). The overbreadth must substantially sweep outside the statute’s plainly legitimate aim. *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008). A statute is not substantially overbroad when its excessive sweep can be cured on a case-by-case basis through an as-applied challenge. *State v. Washington-Davis*, 881 N.W.2d 531, 540 (Minn. 2016). Courts apply the overbreadth doctrine “only as a last resort.” *Dunham*, 708 N.W.2d at 565 (quotation omitted).

The plainly legitimate purpose of Minn. Stat. § 211B.02 is preventing false speech that misleads the public regarding elections. MacDonald argues that the statute substantially sweeps outside this aim and chills truthful political speech because “a candidate cannot truthfully report a sub-unit’s endorsement without threat of a violation that the statement is false because [the RPM] did not endorse.” This argument is unavailing.

First, the statute on its face only prohibits a candidate from making a “knowingly … false claim.” Minn. Stat. § 211B.02. Truthful political speech is not proscribed by the statute. In *Schmitt*, our supreme court considered a predecessor statute of section 211B.02 that similarly prohibited a candidate from making a false claim of endorsement or support from a political party or sub-unit of a political party. 275 N.W.2d at 590.<sup>2</sup> The supreme court observed the statute was narrowly tailored to defeat an overbreadth challenge because it was “directed specifically at *false* claims of endorsement or support.” *Id.* at 590-91 (emphasis added). Moreover, the statute’s specific-intent requirement—that false claims be *knowingly* made—ensures that “the statute does not target broad categories of speech.” *State v. Muccio*, 890 N.W.2d 914, 928 (Minn. 2017).

Second, we reject MacDonald’s contention that the statute prohibits a candidate from truthfully reporting receipt of a party sub-unit’s endorsement. Neither the statutory language nor OAH’s decision supports MacDonald’s assertion that the statute prohibits her from claiming endorsement or support of a sub-unit of the RPM because the party did not endorse her. OAH’s determination that she violated section 211B.02 was not based on the fact that the RPM did not endorse her. Rather, OAH found that she violated the statute by claiming that the judicial-election committee endorsed her when it had not and lacked the authority to do so.<sup>3</sup> Indeed, OAH observed that MacDonald “could have truthfully stated in her candidate profile that a majority of the RPM’s judicial election committee supported her candidacy.” It is the falsity of her statement that the committee *endorsed* her candidacy that violated the statute.

Third, we are not convinced that there are effective less-restrictive means to promote the state’s compelling interest in promoting informed voting and protecting the political process from false claims of support or endorsement. MacDonald relies on *United States v. Alvarez*, 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion), to support her assertion that counterspeech is a less-restrictive means to promote the state’s interest. In *Alvarez*, the United States Supreme Court held that the Stolen Valor Act’s prohibition against falsely claiming receipt of military decorations or medals is unconstitutional. 567 U.S. at 729-30, 132 S.Ct. at 2551. After determining that “[t]he Government’s interest in protecting the integrity of the Medal of Honor is beyond question,” the Supreme Court considered whether counterspeech would effectively protect this interest. *Id.*

at 725, 132 S.Ct. at 2549. The government argued that the truthful-speech remedy was not effective because some military records are lost so the invalidity of certain false claims could not be proved. *Id.* at 728, 132 S.Ct. at 2550. The Supreme Court rejected this argument, concluding that the government failed to make the necessary showing that the “unchallenged claims undermine the public’s perception of the military and the integrity of its awards system.” *Id.*

In contrast, this court concluded that counterspeech is not an effective and less-restrictive means to achieve the compelling interest advanced by [section 211B.02](#) in *Niska v. Clayton*. No. A13-0622, 2014 WL 902680, at \*10 (Minn. App. Mar. 10, 2014), *review denied* (Minn. June 25, 2014). *Niska* involved a claim that false campaign materials violated [section 211B.02](#). This court emphasized the different state interests reflected in the Stolen Valor Act and [section 211B.02](#), stating, “[a]t stake in *Alvarez* was the dishonest speaker’s reputation; at stake under [[section 211B.02](#)] is an accurately informed electorate.” *Id.* And this court concluded “[t]he state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections.” *Id.* While the court’s unpublished decision in *Niska* does not bind us, we find its reasoning persuasive. See *City of St. Paul v. Eldredge*, 788 N.W.2d 522, 526-27 (Minn. App. 2010) (stating unpublished \*670 opinions are not precedential but “may have persuasive value”), *aff’d*, 800 N.W.2d 643 (Minn. 2011). Informed voting is “essential in a free society.” *Daugherty*, 344 N.W.2d at 832. MacDonald has not demonstrated, and we are not persuaded, that counterspeech—even media statements and retractions—is an effective alternative means to combat false claims of support or endorsement. This is particularly true with respect to false claims made in the final days leading up to an election.

[15] Finally, we disagree with MacDonald’s argument that the threat of prosecution under [section 211B.02](#) chills truthful speech. She contends that candidates are “easy targets” for meritless complaints and the statute therefore discourages candidates from making truthful claims of

support or endorsement. But the statutory complaint process contains procedural safeguards to protect against such abuse. Complaints of unfair campaign practices, including those filed under [section 211B.02](#), are subject to mandatory *prima facie* review by an ALJ within three days of filing. *Minn. Stat. § 211B.33, subd. 1 (2016)*. The ALJ must dismiss complaints that do not set forth a *prima facie* violation. *Id.*, subd. 2(a) (2016). If a complaint establishes a *prima facie* violation, the ALJ may be required to conduct an expedited probable-cause hearing. *Id.*, subd. 2(c) (2016). If the ALJ does not dismiss a complaint following the probable-cause hearing, it must schedule an evidentiary hearing before a three-judge panel. *Minn. Stat. §§ 211B.34, subd. 2(b), .35, subd. 1 (2016)*. And we note that complaints must be submitted under oath, further discouraging the filing of false complaints. *Minn. Stat. § 211B.32, subd. 3 (2016)*; see also *Minn. Stat. § 609.48, subd. 1(2) (2016)* (defining the crime of perjury to include making a knowingly false statement “in any writing which is required … to be under oath”). In sum, we are not persuaded that the threat of prosecution impermissibly chills protected speech.

## DECISION

[16] On this record, we conclude that [section 211B.02](#) is not unconstitutionally overbroad. The statute is narrowly tailored to serve the state’s compelling interest in promoting informed voting and protecting the political process and does not substantially sweep outside the statute’s legitimate aim. Because the statute is not unconstitutionally overbroad and OAH had subject-matter jurisdiction to consider Linert’s complaint against MacDonald, we affirm OAH’s decision.

**Affirmed.**

## All Citations

901 N.W.2d 664

## Footnotes

- 1 Moreover, whether the voter guide is a campaign material is irrelevant. Linert’s complaint does not allege a [section 211B.02](#) violation based on falsity of campaign materials.
- 2 Although the *Schmitt* court framed the issue as implicating due process, the court’s analysis focused on the First Amendment.
- 3 At oral argument, MacDonald’s counsel indicated that she is not challenging OAH’s determination that her conduct violated [section 211B.02](#).

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## CIVIL COVER SHEET

The JS 44 civil coversheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

Minnesota RFL Republican Farmer Labor Caucus Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald

(b) County of Residence of First Listed Plaintiff Ramsey

(EXCEPT IN U.S. PLAINTIFF CASES)

**DEFENDANTS**

Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor; et al.

County of Residence of First Listed Defendant Hennepin

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., 150 South Fifth St., Minneapolis, MN 55402 / 612-341-1074

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input type="checkbox"/> PTF 1	<input type="checkbox"/> DEF 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> PTF 4	<input type="checkbox"/> DEF 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability	<b>PROPERTY RIGHTS</b>	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<b>PERSONAL PROPERTY</b>	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 370 Other Fraud	<b>LABOR</b>	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 371 Truth in Lending	<b>SOCIAL SECURITY</b>	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 891 Agricultural Acts
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	<b>PRISONER PETITIONS</b>	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input checked="" type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence	<b>FEDERAL TAX SUITS</b>	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 441 Voting	<b>Habeas Corpus:</b>	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 540 Mandamus & Other		
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 550 Civil Rights		
	<input type="checkbox"/> 448 Education	<input type="checkbox"/> 555 Prison Condition		
		<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		
		<input type="checkbox"/> 462 Naturalization Application		
		<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition)		
		<input type="checkbox"/> 465 Other Immigration Actions		

**V. ORIGIN** (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation
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Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
**42 U.S.C. § 1983**

**VI. CAUSE OF ACTION**

Brief description of cause:  
**Constitutional challenge to Minn. Stat. § 211B.02 as violating First Amendment**

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

07/24/2019

/s/Erick G. Kaardal

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AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE